

## Exhibit 5

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7  
8 **ARBITRATION BEFORE JUDICIAL ARBITRATION AND MEDIATION SERVICE**

9  
10 MARC J. RANDAZZA,

11 Complainant,

12 vs.

13 EXCELSIOR MEDIA CORPORATION,

14 Respondent.

**EXCELSIOR MEDIA CORPORATION'S  
POST-ARBITRATION BRIEF**

15 Excelsior Media Corporation ("Excelsior" or "Respondent" or "Company") by and  
16 through its counsel of record, Littler Mendelson, hereby submits this Brief in support of the  
17 evidence and testimony entered during the recent arbitration hearing. As the Arbitrator is  
18 aware, this matter involves a dispute between Excelsior and its former General Counsel,  
19 Complainant Marc Randazza ("Randazza"). Randazza failed to present evidence which  
20 would allow him to prevail on any of his claims. Instead the evidence establishes the rather  
21 startling lengths this General Counsel went in contravention of the Professional Rules of  
22 Responsibility and his fiduciary obligations to his own client to put his own interests above  
23 all else and Excelsior should recover upon its counterclaims.

24 Regarding Randazza's claims, Randazza was not terminated by Excelsior. Rather,  
25 the evidence is overwhelming that Randazza negotiated a "bribe" for himself in the amount  
26 of \$75,000 as part of a settlement on the Company's behalf. After having been caught by  
27 the company, Randazza knew his transgression was upsetting to Jason Gibson ("Gibson"),  
28

1 the Chief Executive Officer of the Company, and knew he was on unsure ground. He, thus,  
 2 began plotting his exodus from the Company. Matters came to a head on August 29, 2012,  
 3 when Randazza communicated his resignation to the Company stating that he withdrew  
 4 from all future legal matters. Moreover, the evidence, including Randazza's own text  
 5 messages, establish that his allegation that he was harassed because he is a straight male  
 6 is nothing more than leverage --- "a fear he tried to foster" so that Excelsior would keep  
 7 their dispute with Randazza out of the public eye. Randazza has not carried his burden of  
 8 proof as to any of his claims and Excelsior asks for judgment in its favor on all causes of  
 9 action asserted by Randazza.

10 Excelsior believes it met and exceeded its burden of proof with respect to its  
 11 counterclaims. Randazza engaged in numerous ethical and fiduciary transgressions. The  
 12 evidence at the hearing established that Randazza's transgressions include but are not  
 13 limited to, undisclosed negotiations with opposing counsel in another matter for yet another  
 14 bribe for himself, undisclosed negotiations with opposing counsel to serve as co-broker in  
 15 the potential sale of the Company's adversary which would entitle him to 7.5% of a possible  
 16 sale price of \$5 million, undisclosed conflicts of interest where unbeknownst to the  
 17 Company, Randazza represented known copyright infringers of the Company and actually  
 18 dissuaded the Company from taking action against them. Therefore, Excelsior further asks  
 19 for judgment upon its counterclaims asserted in this matter.

## 20 I. ARGUMENT

### 21 A. **RANDAZZA'S LACK OF CREDIBILITY WAS DEMONSTRATED AGAIN 22 AND AGAIN RENDERING HIS TESTIMONY UNRELIABLE.**

23 Upon admission to the Nevada Bar, attorneys take an oath to support the  
 24 Constitution and the government of the United States and the State of Nevada. Nevada  
 25 Supreme Court Rule ("SCR") No. 73. Attorneys promise to abide by and "follow the Rules  
 26 of Professional Conduct" and to "faithfully and honestly discharge the duties of an attorney  
 27 at law to the best of [their] knowledge and ability." SCR No. 73. California attorneys take a  
 28 similar oath when admitted to practice in that state. The testimony and documentary

1 evidence admitted during the hearing in this matter establish that Randazza's conduct while  
 2 employed as Excelsior's in-house counsel was not compliant with the oath he made when  
 3 he began practicing law in these states. Further, his representations and testimony in this  
 4 case (and other related proceedings) have shown that Randazza is not afraid to bend the  
 5 truth or make blatant misrepresentations if it would benefit him.

6 Randazza's mannerisms during the evidentiary hearing in this matter were telling.  
 7 He could not even look the cross-examiner in the eye. Instead, he sat side-ways staring  
 8 toward the wall for the majority of his cross-examination. Such behavior is not entirely  
 9 surprising considering the evidence during the hearing established multiple  
 10 misrepresentations he told throughout the pendency of his dispute(s) with Excelsior.<sup>1</sup>

11 In fact, Excelsior believes that the number and nature of the misrepresentations  
 12 made by Randazza clearly evidence that he is not credible and no weight should be placed  
 13 on his testimony. Randazza's testimony revealed that he made false statements to the  
 14 EEOC in his charge of discrimination, to a federal court in a motion for fees, to the Florida  
 15 Bar in response to a complaint made against him, in his Complaint in this matter, and in his  
 16 pre-arbitration brief.<sup>2</sup> **See Arbitration Hearing Transcript (hereinafter "Tr.") at 314:21-**  
 17 **318:1, 319:4-16, 326:20-329-22, 341:1-341:25, 342:24-343:16, 418:8-422:19, 538:18-**  
 18 **542:14, 610:11-612:5.** Indeed, the evidence at the hearing even revealed that Randazza  
 19 was not truthful with his own ethics expert. *Id.* at 1173:2-1176:20.

20 Some of the most powerful evidence in this case arises from Randazza's ever-  
 21 evolving misrepresentations to cover up his misdeeds. As the Arbitrator will recall, with  
 22 respect to Xvideos, prior to being compelled to produce retainer agreements and billing  
 23

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24 <sup>1</sup> Randazza demonstrated further inappropriate (and childish) behavior immediately after the  
 25 arbitration. Upon arriving at her vehicle in the parking lot at the conclusion of the arbitration, Ms.  
 26 Krincek found that someone had stuck gum on the middle of the back windshield of her vehicle.  
 27 After learning of this information, Mr. Dunlap of Excelsior notified Ms. Krincek that while walking to  
 28 his vehicle following the arbitration, he witnessed Randazza standing at the back of Ms. Krincek's  
 vehicle taking a photograph with a phone apparently proud of himself for having the courage to  
 deface Ms. Krincek's vehicle.

<sup>2</sup> Randazza also proudly testified that he is not opposed to lying to opposing counsel throughout the  
 course of litigation. **Tr. at 392:18-20.**



1 records, Randazza represented to the State Bar that he represented Xvideos in resolving  
 2 one specific matter and, "after that, Randazza did not do any work for Xvideos." **Exhibit**  
 3 **372 at EMC001610.** Randazza further reported this same misrepresentation to his own  
 4 ethics expert -- that his representation of Xvideos was very limited in scope and ceased in  
 5 2009 -- which then became a basis for his own expert's conclusions. **Tr. at 1173:5-13.** At  
 6 arbitration, Randazza was forced to acknowledge his misrepresentation to the bar and  
 7 admit that after the one specific matter he handled for Xvideos, rather than ceasing to do  
 8 further work for them as he reported to the State Bar and his ethics experts, he continued  
 9 to represent Xvideos and, in fact, billed time to Xvideos during each of the following 23  
 10 months he remained employed by Excelsior, all the while dissuading Excelsior from  
 11 pursuing claims against Xvideos. **Tr. at 538:8-541:22 and Exhibit 313 at p. 4.**

12 Likewise, with respect to TNAflix, prior to Excelsior disclosing that it had obtained  
 13 Randazza's email communications with opposing counsel in the TNAflix matter, Randazza  
 14 reported to the State Bar that after being offered a bribe by opposing counsel to never sue  
 15 his client again, Randazza responded by informing, "both Mr. Gurvits and Gibson that  
 16 Randazza would not accept payment in exchange for a limitation on who Randazza could  
 17 represent or not represent in the future." **Exhibit 372 at EMC001606 and Tr. 240:18-**  
 18 **243:2.** The evidence undeniably demonstrates that Randazza's representation to the State  
 19 Bar is not truthful. Randazza's emails prove that he explicitly initiated and negotiated for a  
 20 monetary payment for himself to conflict himself out of ever being adverse to TNAflix. **Tr.**  
 21 **346:17-370.23.** Thus, at arbitration, Randazza was forced to abandon the position he took  
 22 with the State Bar -- that Gurvits offered him a payment to conflict him out and he refused  
 23 that overture. Randazza's new story at arbitration became that he did negotiate for a  
 24 payment to conflict himself out (and to broker a sale of TNAflix for a fee), but it was all  
 25 make-believe and part of a negotiation strategy to get Liberty more settlement money. *Id.*  
 26 However, even this new story is belied by the evidence. After the TNAflix matter was  
 27 settled, Randazza not only drafted and forwarded agreements for TNAflix to retain him to  
 28 conflict him out and serve as a broker, but was almost desperate in his communications

1 Cir. 2002) (*quoting Akiona v. U.S.*, 938 F.2d 158, 161 (9th Cir. 1991)). A party's duty to  
 2 preserve begins when the party reasonably should have known that the evidence is  
 3 relevant to anticipated litigation. *Painter* at \*10 *citing In re Napster*, 462 F.Supp.2d 1060,  
 4 1067 (N.D.Cal. 2006).

5 A plaintiff, specifically, has a duty to preserve any and all relevant documentation,  
 6 including electronic documents, as soon as they begin considering litigation. *See Pension*  
 7 *Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456,  
 8 466 (S.D.N.Y. 2010) ("A plaintiff's duty is more often triggered before litigation commences,  
 9 in large part because plaintiffs control the timing of litigation."); *see also, Cyntegra, Inc. v.*  
 10 *Idexx Labs., Inc.*, No. CV06-4170PSG(CTX), 2007 WL 5193736, at \*3 (C.D. Cal. Sept. 21,  
 11 2007) *aff'd*, 322 F. App'x 569 (9th Cir. 2009)(because plaintiffs control when litigation  
 12 begins, they "must necessarily anticipate litigation before the complaint is filed"); The  
 13 Sedona Conference Commentary on Legal Holds: The Trigger & The Process, pp. 271  
 14 (August 2010) ("On the plaintiff's side, seeking advice of counsel, sending a cease and  
 15 desist letter, or taking specific steps to commence litigation may trigger the duty to  
 16 preserve.... The test of the timing of the trigger is often based on when the party  
 17 'determine[d] [that] legal action is appropriate.'" (*citing Milenkamp v. Davisco Foods, Int'l*,  
 18 562 F.3d 971, 981 (9th Cir. 2009)).

19 Courts have broad discretion in determining a proper sanction for spoliation,  
 20 including monetary sanctions, attorney fees, adverse inferences, and outright dismissal of a  
 21 lawsuit. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Herson v. City of*  
 22 *Richmond*, No. C 09-02516 PJH LB, 2011 WL 3516162, at \*4 (N.D. Cal. Aug. 11,  
 23 2011)(noting that a monetary sanction is a possible sanction for spoliation of evidence).  
 24 Prior to imposing sanctions, the spoliated evidence must be shown to be relevant to moving  
 25 party's case. *Holiday v. Am. Cas. Co. of Reading, PA*, 2013 WL 1955561 (*citing May v. F/V*  
 26 *LORENA MARIE*, 2011 U.S. Dist. LEXIS 52695, 2011 WL 1875470 (D. Alaska May 16,  
 27 2011)); *Ingham v. United States*, 167 F.3d 1240, 1246 (9th Cir.1999). However, the  
 28 spoliator is not entitled to a presumption that the deleted evidence was irrelevant. *Leon v.*

1 with Gurvits to have those agreements executed. Tr. 370:24-379:18. The absurdity of  
 2 Randazza's latest story is evidenced by his own testimony:

3 Q: Now, this is building on the last e-mail that we looked at where you  
 4 had forwarded to Val the retainer agreement, the broker agreement  
 for TNAFlix on February 11<sup>th</sup>?

5 A: Yes.

6 Q: Later in this afternoon, Val responds and he says, I forwarded to my  
 client. Will let you know what they say. Do you see that?

7 A: Yes.

8 Q: And you respond to Val, and you say, Please prevail upon them that  
 time is of the essence. Do you see this?

9 A: I do.

10 Q: Time is of the essence with respect to this hypothetical sale of  
 TNAFlix where you don't really have a client that's interested in  
 buying them --

11 A: Yes.

12 Tr. 375:18-376:12.

13 Again and again, Randazza has shown himself to not be credible. Excelsior  
 14 believes Randazza's testimony should not warrant any weight in any regard absent some  
 15 independent evidence supporting his testimony. Randazza's defense to the counterclaims  
 16 brought against him depend almost entirely upon his testimony that although his actions  
 17 may have appeared unethical, he engaged in them in order to benefit Excelsior. Setting  
 18 aside the clear illogical nature of many of Randazza's positions, his lack of credibility  
 makes it impossible to believe the explanations for his unethical behavior.

19 **B. RANDAZZA SHOULD BE SANCTIONED FOR INTENTIONALLY  
 20 WIPING HIS COMPANY LAPTOP**

21 The evidence of presented at arbitration warrants an adverse inference based upon  
 22 Randazza's spoliation of evidence. Spoliation of evidence is "the destruction or significant  
 23 alteration of evidence, or the failure to preserve property for another's use as evidence in  
 24 pending or reasonably foreseeable litigation." *Painter v. Atwood*, No. 2:12-CV-01215-JCM,  
 25 2014 WL 1089694, at \*3 (D. Nev. Mar. 18, 2014); see also *United States v. Kitsap*  
 26 *Physicians Service*, 314 F.3d 995, 1001 (9th Cir. 2002). A party engages in spoliation as a  
 27 matter of law if the party had "some notice that the documents were potentially relevant" to  
 28 the litigation before they were destroyed. *Kitsap Physicians Service*, 314 F.3d at 1001 (9th

1 *IDX SYSTEMS CORP.*, 464 F.3d 951, 959 (9th Cir. 2006) ("a party can hardly assert any  
 2 presumption of irrelevance as to the destroyed documents"); *Cyntegra, Inc. v. Idexx*  
 3 *Laboratories, Inc.*, 2007 U.S. Dist. LEXIS 97417 (C.D. Cal. September 21, 2007). Indeed,  
 4 in spoliation cases, "courts must not hold the prejudiced party to too strict a standard of  
 5 proof regarding the likely contents of the destroyed evidence because doing so allows the  
 6 spoliators to profit from the destruction of evidence." *Se. Mech. Servs., Inc. v. Brody*, 657 F.  
 7 Supp. 2d 1293, 1300 (M.D. Fla. 2009)(citing *Kronisch v. United States*, 150 F.3d 112, 128  
 8 (2d Cir. 1998)); *see also Ritchie v. U.S.*, 451 F.3d 1019, 1024-25 (9th Cir. 2006)(adopting  
 9 the Second Circuit's approach as discussed in *Kronisch*).

10 Here, Randazza, an attorney knowledgeable about spoliation, admittedly deleted  
 11 and destroyed evidence or failed to properly preserve evidence. According to Randazza,  
 12 his relationship with Gibson, the CEO, and the Company began deteriorating in April 2012.  
 13 **Exhibit 302 at ¶¶ 34-46; Tr. at 102:19-21.** Randazza claims that the hostility and unlawful  
 14 behavior escalated throughout the month of August 2012—so much so that he openly  
 15 accused Gibson of attempting to cheat him out of a bonus. **Tr. at 204:21-205:3.** On August  
 16 29, 2012, Randazza wrote Gibson an email resigning his employment with the company.  
 17 **Exhibit 74 (EMC000186).** Later that day, Randazza further communicated that he was  
 18 already represented by counsel. *Id.* As an attorney, Randazza was keenly aware of his  
 19 need to preserve the electronic information contained on his company issued laptop. **Tr. at**  
 20 **469:7-10.** Nonetheless, Randazza admittedly sought help from an Excelsior employee in  
 21 order to successfully wipe data from his laptop. *Id.* at 200:7-201:10, 465:10-467:24.  
 22 Excelsior's expert, Michael Holpuch, testified and submitted a detailed report in this matter  
 23 which highlights that Randazza ran wiping software on his computer on four separate  
 24 occasions from August 28-30, 2012. **See Exhibit 305, Expert Report of Michael Holpuch**  
 25 **at p. 3 of 41; Tr. at 975:20-978:2, 982:12-16, 982:22-984:22.** Erika Dillon's (Randazza's  
 26 paralegal) laptop was also wiped on August 29, 2012 using the same software. *Id.* As a  
 27 result of the wiping software being run, "[n]o deleted files could be recovered from the  
 28 unallocated space of either device due to the use of Disk Utility Secure Erase." **Exhibit 305**

1 at p. 3 of 41; Tr. at 978:20-981:19, 982:17-21, 985:5-8.

2 Randazza deliberately wiped his company issued laptop and instructed Dillon to do  
3 the same in order to prevent discovery of files which likely would have revealed further  
4 evidence of his unethical behavior and plans to resign. Even in situations where the exact  
5 contents of the spoliated evidence cannot be determined because of the nature of their  
6 destruction, courts have not hesitated to impose default judgments on parties that  
7 deliberately destroy potential evidence. See *Commc'ns Ctr., Inc. v. Hewitt*, No. CIV.S-03-  
8 1968 WBS KJ, 2005 WL 3277983, at \*1-3 (E.D. Cal. Apr. 5, 2005)(use of wiping software  
9 results in recommendation of default judgment and award of over \$145,000 in expenses  
10 and costs); *DirecTV, Inc. v. Randy Borow*, No. 03 C 2581, 2005 WL 43261, at \*5-6 (N.D. Ill.  
11 Jan. 6, 2005)(defendants use of wiping software warrants default judgment); *Kucala*  
12 *Enterprises, Ltd. v. Auto Wax Co.*, No. 02 C 1403, 2003 WL 21230605, at \*6 (N.D. Ill. May  
13 27, 2003)(“[t]he possibility that relevant documents were included in that mass deletion is  
14 something this Court cannot overlook-especially given the nature of the [wiping software]”).

15 While Randazza testified that Excelsior's legal files were preserved on his "Jungle  
16 Disk" cloud storage service, by wiping his laptop it is highly likely that he eliminated  
17 documents and correspondence related to his outside practice and personal business  
18 interests that would further support the claims Excelsior brings against him. See Tr. at  
19 197:20-199:14, 201:11-16 (only representing that Excelsior's data was preserved).  
20 Had Randazza not wiped his laptop, Respondent could have uncovered further evidence  
21 regarding the identity of clients that created conflicts of interest, further evidence of  
22 improper negotiations with adverse parties, evidence of the amount of work Randazza was  
23 doing in furtherance of his own law practice at the expense of Excelsior, and further  
24 evidence of Randazza's plans to resign. Such evidence goes to the heart of this case.  
25 Moreover, Randazza's allegation that he wiped his laptop due to concerns about private  
26 information such as tax return information being on the laptop simply does not hold water.  
27 Randazza had the same concerns regarding his iPhone and simply refused to turn over his  
28 iPhone until an agreement was reached for a third party to examine and retrieve



1 information from the iPhone. As an attorney, Randazza is well-aware that wiping the  
 2 Company owned and issued laptop was improper. He risked doing so for a reason – to  
 3 spoliage evidence. Randazza's failure to preserve such potentially relevant evidence  
 4 should at least subject him to an adverse inference that the documents and files wiped  
 5 from his laptop would have supported Excelsior's defenses and counterclaims in this  
 6 matter. Therefore, Excelsior requests that the Arbitrator make a formal finding that  
 7 Randazza's wiping of his laptop warrants an adverse inference in this matter.

8  
 9 **C. RANDAZZA DID NOT PROVE HIS CLAIMS AGAINST  
 EXCELSIOR BY A PREPONDERANCE OF THE EVIDENCE**

10 **1. Reimbursement of Expenses Under Cal. Labor Code § 2802 and**  
 11 **Unpaid Wages and Vacation Time Under Cal. Labor Code §§ 201-**  
 12 **203**

13 **a. *The California Labor Code Does Not Apply to Randazza's***  
 14 ***Employment in Nevada***

15 Randazza's First and Second causes of action allege violations of the California  
 16 Labor Code even though the alleged conduct occurred while Randazza lived and worked in  
 17 Nevada. In Claim One, Randazza alleges that Excelsior failed to reimburse and indemnify  
 18 for business expenses incurred in Nevada during 2012 in violation of California law. In  
 19 Claim Two, Randazza alleges Excelsior failed to pay him his final wages in August 2012 in  
 20 accordance with California law, even though Randazza lived and worked in Nevada.  
 21 Randazza admits he moved to Nevada in mid-2011 to continue his role as General  
 22 Counsel for Excelsior. Tr. at 494:18-495:15; Exhibit 302 at ¶ 21. Thus, the evidence  
 23 offered in support of Claim One and Claim Two solely relate to alleged conduct that  
 24 occurred in Nevada to a Nevada employee.

25 While Randazza argues that the Governing Law clause in the Employment  
 26 Agreement specifying that California law will govern the interpretation of the Employment  
 27 Agreement, acts to import California's wage and hour laws to his employment in the State  
 28 of Nevada, his position fundamentally confuses the purpose of a choice of law provision.

1 The Governing Law clause in Section 9(E) states that the Agreement "shall be governed  
 2 by and construed in accordance with the laws of the State of California, without regard to  
 3 conflict of laws." **Exhibit 332.** Unfortunately for Randazza, the Governing Law clause  
 4 does not imply that Randazza is subject to all of the protections of California law without  
 5 regard to the state in which he primarily works. Rather, a choice of law provision does  
 6 nothing more than govern the law used for claims arising out of the contract, such as  
 7 contractual claims. Randazza's First and Second Causes of Action are statutory and not  
 8 contractual, and are completely unrelated to the Governing Law clause.

9 Case law, including that within the Ninth Circuit, establishes that choice of law  
 10 clauses apply only to claims asserting breach of a contract and not to statutory claims. See,  
 11 e.g., *Dollar Systems, Inc. v. Avcar Leasing Systems, Inc.*, 890 F.2d 165, 171 (9th Cir. 1989)  
 12 (choice of law clause does not govern statutory cause of action not founded on  
 13 performance or interpretation of contract); *Telequest, Inc. v. Norton Cattle Co.*, 189 F.3d  
 14 474,\*1; 1999 U.S. App. LEXIS 18269 (9th Cir. 1999)(unpublished disposition)(applying  
 15 Nevada choice of law rules, holding that forum selection clause "only governs the  
 16 interpretation of the agreement, not the resolution of tort claims," which "ordinarily are not  
 17 controlled by contractual choice of law provisions"); *Med. Instrument Dev. Labs. v. Alcon*  
 18 *Labs.*, No. C 05-1138 MJJ, 2005 WL 1926673 (N.D. Cal. Aug. 10, 2005) (choice-of-law  
 19 clause does not govern non-contractual claim arising under California Business &  
 20 Professions Code); *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676, 684  
 21 (Tex. App. 2007) (choice-of-law clause does not cover statutory claims); *Ayco Co. v. Frisch*,  
 22 795 F. Supp. 2d 193, 203 (N.D.N.Y. 2011) (choice of law clause stating agreement "shall  
 23 be governed by and construed and enforced in accordance with the laws" of New York  
 24 does not govern non-contractual claims). The Arbitrator may further wish to review his  
 25 Order dated July 3, 2013 for its general agreement that California's wage and hour laws do  
 26 not act extraterritorially. **Attached hereto as Exhibit A.**

27 Randazza's claims arise under the California Labor Code and, therefore, are non-  
 28 contractual claims which are not governed by the Employment Agreement. *Narayan v.*



1 *EGL, Inc.*, 616 F.3d 895, 899 (9th Cir. 2010) (benefit claims brought under California Labor  
 2 Code "do not arise out of the contract, involve the interpretation of any contract terms, or  
 3 otherwise require there to be a contract"); *SEC v. Elmas Trading Corp.*, 683 F. Supp. 743,  
 4 749 (D. Nev. 1987)(source of the right at issue, rather than the jurisdictional basis of the  
 5 court, shall control the choice of law). Thus, the Governing Law clause does not offer  
 6 Randazza the protections of California law for his employment in Nevada. As a resident of  
 7 Nevada performing work solely in Nevada during the time period specified in the allegations  
 8 of the claims, Randazza has no basis for asserting any statutory claims brought pursuant to  
 9 the California Labor Code and the claims should be dismissed.

10 Even if Randazza's theory was correct and California substantive law applied to his  
 11 employment relationship with Excelsior while working in Nevada by virtue of the Governing  
 12 Law clause, California's wage and hour laws would still not apply to his employment in  
 13 Nevada. California follows the presumption against extraterritoriality. In other words,  
 14 California does not apply its laws outside of its borders unless intent to apply  
 15 extraterritorially is set forth explicitly within a statute. See *Sullivan v. Oracle Corp.*, 51 Cal.  
 16 4th 1191, 1207 (Cal. 2011) (noting California's long standing presumption against  
 17 extraterritoriality). If the Governing Law clause imports all of California law to the  
 18 employment relationship between Excelsior and Randazza, Randazza cannot pick and  
 19 choose which parts of California law he wants and discard the others. He is also forced to  
 20 live with California's presumption against extraterritoriality.<sup>3</sup>

21 **b. Excelsior has Correctly Compensated Randazza**

22 Section 2802(a) provides that "[a]n employer shall indemnify his or her employee for  
 23 all necessary expenditures or losses incurred by the employee in direct consequence of the  
 24

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25 <sup>3</sup> In fact, the Supreme Court of California reinforced its reliance on the presumption against  
 26 extraterritorial application in a wage and hour case and held that California laws, unless explicitly  
 27 stated within the language of the statute, do not extend to acts occurring outside of the state.  
 28 *Sullivan*, 51 Cal. 4th at 1207. Moreover, on May 3, 2012, in *Wright v. Adventures Rolling Cross  
 Country, Inc.*, 2012 U.S. Dist. LEXIS 104378 (N.D. Cal., May 3, 2012), the court noted that the  
 presumption against extraterritorial application of state law applies to the California Labor Code with  
 regard to claims for unpaid wages.

1 discharge of his or her duties, or of his or her obedience to the directions of the employer,  
 2 even though unlawful, unless the employee, at the time of obeying the directions, believed  
 3 them to be unlawful." Cal. Lab. Code § 2802(a). Similarly, Section 201 states that "[i]f an  
 4 employer discharges an employee, the wages earned and unpaid at the time of discharge  
 5 are due and payable immediately." Cal. Lab. Code § 201. Randazza claims he has not  
 6 been compensated for: (1) a \$25,000 loan he made to the company which he attempts to  
 7 characterize as an advancement in furtherance of the Oron litigation, (2) one day of his final  
 8 week's salary, (3) a wage increase he claims he was owed during the last two months of  
 9 his employment totaling \$2,281.95, (4) unused vacation time, and (5) various bonuses he  
 10 claims were vested prior to his termination (Oron settlement, Oron attorney fee award,  
 11 Excubitor gross instead of net, alleged Pennsylvania settlement and unspecified other  
 12 settlements).<sup>4</sup> **Tr. at 492:19-495:15; Exhibit 302.** As discussed below, all of Randazza's  
 13 claims are meritless.

14 The evidence establishes that Randazza is not entitled to the compensation and  
 15 reimbursements he claims he is owed in light of the following:

- 16 • The Company never received full payment of the Oron settlement given that the  
 17 money remains in Randazza's trust account and is in dispute in this matter. **Tr. at**  
 18 **495:16-497:5.** Respondent's requirement to pay the \$25,000 loan under the  
 19 Promissory Note is not triggered until the settlement money is received (which is yet  
 20 to occur). **See Exhibit 373.** Additionally, and as discussed in Dennis Kennedy's  
 21 Expert Report, Randazza committed malpractice and breached the fiduciary duty  
 22 owed to Excelsior when he entered into the improper loan agreement with the  
 23 company. **Exhibit 304, Kennedy's Report at ¶¶ 32.9 - 32.9.7; Tr. 1022:20-1025:3.**  
 24 In light of his unethical behavior, the transaction is voidable at Liberty's election.  
 25 **Exhibit 304, Kennedy's Report at ¶ 32.9.7.** Excelsior formally seeks that the  
 26

27 <sup>4</sup> Randazza's Amended Arbitration Demand alleges he is also owed a final expense report totaling  
 28 \$1,103.70. However, during the hearing, Randazza's counsel admitted that Randazza is no longer  
 pursuing such a claim. **Tr. at 492:19-493:6.**

1       \$25,000 note be voided.

- 2       • The Fair Labor Standards Act allows an employer to prorate an employee's salary in  
3       the first and last weeks of employment based on actual time worked. See 29 C.F.R.  
4       § 541.602. Nevada's state wage and hour law typically mirrors provisions of the  
5       FLSA unless language from a Nevada statute indicates otherwise. See *Terry v.*  
6       *Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 955-956 (Nev.  
7       2014). Gibson, Excelsior's CEO, testified that the company pro-rated Randazza's  
8       final paycheck to the amount of days he actually worked as was customary. **Tr. at**  
9       **728:22-729:2**. In light of these facts, Randazza was correctly paid for the actual  
10      amount of days he was employed by the Company during his final week as  
11      permitted by law.
- 12      • The wage increase Randazza claims he is owed was optional to the Company. In  
13      accordance with the Employment Agreement, Excelsior elected not to give  
14      Randazza the raise he claims he was entitled to in light of unforeseen business  
15      circumstances. See **Exhibit 332, Section 3.B**. Gibson testified that Randazza  
16      advised him that the Company was not obligated to give him the salary increase he  
17      now claims he is owed. **Tr. at 727:5-728:21**. While Randazza claims that in order  
18      for Excelsior to not owe him the raise the Company was required to execute a  
19      Memorandum of Understanding reflecting the same, Gibson testified that Randazza  
20      never advised him of such a requirement and never informed him of the need to  
21      consult with another attorney for assistance in interpreting the Agreement. *Id.*  
22      Additionally, in correspondence with Gibson on August 16, 2012, Randazza  
23      admitted that he had advised Gibson that the company was not obligated to give him  
24      a raise. **Exhibit 327**.
- 25      • As to the paid time-off and vacation Randazza claims he is owed, he presented no  
26      evidence that he was owed any additional vacation or paid time-off than he was  
27      already compensated for. Additionally, Gibson testified that he was careful to  
28      ensure that all of the PTO owed to Randazza, was paid in his final check. **Tr. at**

724:13-726:14; Exhibits 392-393.

- Contrary to Randazza's belief, he is not entitled to the bonuses he claims were vested because: (1) the 25% bonus off the Oron settlement he claims he was owed should be disgorged/forfeited in light of his malpractice, breach of fiduciary duty, and damages caused to the Company<sup>5</sup> (**See Exhibit 304, Kennedy Report at ¶¶51-52.5**); (2) As to his claimed bonus off the Oron fee award, there is no evidence that the Company received the fee award from the District of Nevada and even if there were, Randazza would not be entitled to a portion of it because his agreement only entitles him to a portion of settlement proceeds, not fee awards<sup>6</sup> (**See Exhibit 332 at Section 3.C stating Randazza receives bonus from "settlement funds"**); (3) As to his claim that he is owed an additional portion of the Excubitor bonus, Randazza, as set forth below, Randazza is not entitled to receive any Oron-related bonus because of his misconduct in handling those matters. Even if Randazza were entitled to receive a bonus on the Oron settlement, he was only entitled to bonuses off the net of settlement awards and not the gross amount he now claims he is owed (**See Tr. at 497:6-498:8; Exhibit 383**)(acknowledging that Agreement did not adequately address whether bonus should be paid on net or gross). In an attempt to avoid the well settled rule that ambiguities in a contract are to be construed against the drafter, during the hearing Randazza misrepresented his role as the drafter of the employment agreement. In reality, after the parties discussed Randazza potentially joining the Company, Excelsior sent him an offer letter and Randazza responded by sending Gibson the draft Employment Agreement (**Tr. 666:25-668:7, 671:25-672:11, 673:17-674:4**). In light of these facts, any ambiguity as to whether

<sup>5</sup> Additionally, the Company was forced to resettle the Oron litigation and \$275,000 of that original settlement amount was returned to Oron. Accordingly, even if Randazza were owed a bonus off the settlement it would not be 25% of the \$550,000 original settlement (it would be a portion of the \$275,000 resettlement value).

<sup>6</sup> In an email to opposing during the Oron litigation Randazza was requesting that Oron pay for half of the fees expended on the litigation and while asking for them to extend an "olive branch" he admitted that he doesn't "get paid more for [a fee award]." **Exhibit 376.**

1 Randazza should be paid off the gross vs. the net, should be construed against  
 2 Randazza; and (4) the other bonuses he claims he was owed are entirely  
 3 speculative, no evidence was presented in this case which establishes a right to a  
 4 portion of such bonuses, and any such bonus should be disgorged.

## 5 2. Unpaid Wages and Penalties Under NRS § 608.050

6 In the alternative to Randazza's California Labor Code claims, Randazza alleges  
 7 that he is entitled to unpaid wages and penalties under NRS § 608.050. As noted  
 8 previously, Randazza's allegation that the damages he seeks are provided for under this  
 9 statute clearly misses the mark. NRS § 608.050 allows the continuation of regular wages to  
 10 an employee who is not paid his or her regular wage when that wage becomes due after  
 11 the employment relationship terminates, for up to 30 days. *Orquiza v. Walldesign, Inc.*, No.  
 12 2:11-CV-1374 JCM CWH, 2012 WL 2327685, at \*6 (D. Nev. June 19, 2012). These  
 13 penalties "apply only to the regular wages owed to an employee for the work performed  
 14 between pay periods at the time employment ended." *Id.* at 5 (emphasis added); *Evans v.*  
 15 *Wal-Mart Stores, Inc.*, No. 2:10-CV-1224 JCM VCF, 2014 WL 298632, at \*3-5 (D. Nev. Jan.  
 16 24, 2014) *see also* NRS 608.012 (specifically noting that a bonus is not within the definition  
 17 of wages under Nevada law). Accordingly, Randazza's allegation that the alleged unpaid  
 18 \$25,000 loan and the various bonuses he claims he is owed give rise to this claim is an  
 19 attempt to fit a square peg into a round hole. Additionally, this statute applies only when an  
 20 employee was discharged or laid off. NRS § 608.050 ("[w]hensoever an employer of labor  
 21 shall discharge or lay off employees"). As discussed *infra*, Randazza was not discharged or  
 22 laid off—he resigned his employment. Accordingly, NRS § 608.050 is inapplicable.

23 Even if the statute were applicable to the instant situation, Nevada case law holds  
 24 that no private right of action exists to enforce this statute. *McDonagh v. Harrah's Las*  
 25 *Vegas, Inc.*, No. 2:13-CV-1744 JCM CWH, 2014 WL 2742874, at \*3 (D. Nev. June 17,  
 26 2014). In actuality, enforcement of this statute, and many others in NRS Chapter 608, lies  
 27 with the Nevada Labor Commissioner—not private litigants. *Id.* Given that no private right  
 28 of actions exists to enforce the penalties envisioned in NRS § 608.050, the instant claim



1 should be dismissed accordingly.<sup>7</sup>

### 2 3. Breach of Contract

3 Randazza claims Excelsior breached his Employment Agreement by not paying him  
4 a 12-week severance he claims he was entitled to, a 25% bonus off of the Oron settlement,  
5 and a bonus off any additional settlements received since his employment ended.<sup>8</sup>  
6 Randazza has not proven his allegations by a preponderance of the evidence because the  
7 evidence shows that he resigned his employment which excused Excelsior's obligation to  
8 pay a severance, Randazza has prevented Excelsior from ever collecting the actual Oron  
9 settlement funds and committed a material breach of the agreement which excuses  
10 Excelsior's performance under the agreement. Additionally, Randazza presented no  
11 competent evidence which shows any other settlements were ever received by the  
12 company to which he would be entitled a portion thereof.

13 The well-established elements of a cause of action for breach of contract are: (1) the  
14 existence of a contract; (2) Plaintiff's performance or excuse for nonperformance; (3)  
15 Defendant's breach; and (4) the resulting damages to Plaintiff.<sup>9</sup> *Careau & Co. v. Security*  
16 *Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1388 (1990). When a party's failure to  
17 perform a contractual obligation constitutes a material breach of the contract, the other  
18 party may be discharged from its duty to perform under the contract. *Brown v. Grimes*, 192  
19 Cal. App. 4th 265, 277, 120 Cal. Rptr. 3d 893, 902 (2011)(citing 1 Witkin, Summary of Cal.  
20 Law (10th ed. 2005) Contracts, §§ 813, 814, p. 906 (Witkin)("Material failure of  
21 consideration discharges the other party's duty").

22 <sup>7</sup> Even if a cause of action existed for violation of NRS § 608.050, as discussed *supra* Respondent  
23 fulfilled all payment obligations it had at the time of Randazza's termination. Accordingly, Randazza  
24 is not entitled to any of the alleged items of damages he now seeks.

25 <sup>8</sup> Randazza's Amended Arbitration Demand claims Randazza was also owed money for Excelsior's  
26 failure to pay expenses to attend the annual International Trademark Association Conference.  
27 Even so, Randazza did not testify that he continues to seek such alleged damages. Even if he  
28 were, Randazza admits he never attended the conference and thus did not incur any such  
expenses. **Exhibit 302 at ¶ 100.** He also presented no evidence at the hearing to establish any  
other alleged damages flowing from this claimed breach. Randazza's inability to establish damages  
from this alleged breach renders it meritless.

<sup>9</sup> Excelsior agrees that California law governs the determination of whether it breached Randazza's  
Employment Agreement in light of the choice of law provision contained in the agreement.

Excelsior does not dispute that it never paid Randazza the severance. Randazza resigned his employment and is not entitled to severance for a resignation. **Exhibit 332, Section 7.B.** That is exactly what Randazza did when he emailed Gibson to tell him that it was necessary to withdraw from representing the company in further matters. **Exhibit 329 (EMC000186).** An analysis of Randazza's communications with various individuals prior to sending his resignation email on August 29, 2012 reveals that (even though he may have soon after regretted his actions) he undoubtedly meant to resign on the day in question and Excelsior reasonably construed his email communication as such:

**August 24, 2012**

**6:28 p.m. Randazza text to Dillon (Randazza's paralegal at Excelsior):** Btw: if I get my severance, which I might, you're not taking a pay cut of any significance. If at all. **Exhibit 421 (Dillon Text Messages).**<sup>10</sup>

**August 27, 2012**

**1:13 p.m. Randazza text to Dillon:** Dictations go to eed@randazza.con. Com. From now on. **Exhibit 421.**<sup>11</sup>

**August 29, 2012**

**9:26 a.m. Randazza Skype message to Dillon:** today may be D-Day.

**9:28 a.m. Dillon Skype message to Randazza:** it shall be done.

**9:28 a.m. Randazza Skype message to Dillon:** when you do quit, make sure you delete your jungle disk program.

**9:29 a.m. Dillon Skype message to Randazza:** roger. **Exhibit 375 (Skype Conversation).**

**12:28 p.m. Randazza email to Gibson and Henry Leonard:** I'm not forwarding \$550,000. I'm taking my share, the costs we owe to outside parties, and paying myself back the \$25,000 I advanced. Then I'm giving you your net, which is more than you expected ... **Exhibit 328; see also Tr. at 461:14-462:15.**

**12:32 p.m. Randazza text to Dillon:** Get ready. Make sure to log out of servers.

<sup>10</sup> Randazza doesn't deny that even as early as August 24, 2012 he and Dillon had already discussed an arrangement for her to leave with him to work at Randazza Legal Group. **Tr. at 474:2-16.** Randazza also confirmed that on August 24, 2012 he filed Articles of Incorporation for Randazza Legal Group in Nevada. **Id. at 474:24-475:4.**

<sup>11</sup> Randazza also acknowledges that at this time he had already set-up an email account for Dillon at Randazza Legal Group. **Tr. 474:7-16.**



1 **Dillon text to Randazza:** Oh jeeze. Really? Hold on. I have some shit I need  
2 to wipe delete. Give me 15?

3 **Randazza text to Dillon:** K. Just be ready.

4 **Dillon text to Randazza:** Yeah. I just want to make sure I have everything  
5 together.

6 **Dillon text to Randazza:** Hey. I need a little more time. I've got the disk stuff  
7 transferring now. It's segregated on the cf legal, but it's not done transferring  
8 to the sharedadmin.

9 **Randazza text to Dillon:** Ok.

10 **12:45 p.m. Dillon text to Randazza:** There are still some personal things in  
11 your office (tools, shoes, guns, boxes). Should I be trying to take all of that  
12 with me?

13 **Randazza text to Dillon:** Ya.

14 **Dillon text to Randazza:** Okay then I have a lot of stuff to get out of here.  
15 Would it be possible for me to walk tmrw so I can come in early and clear this  
16 all out or is that not gonna happen?

17 **Randazza text to Dillon:** Yep.

18 **Dillon text to Randazza:** That was an or question.

19 **Randazza text to Dillon:** You can boogie tomorrow.

20 **Dillon text to Randazza:** Phew. Sweet. I'm going to run to lunch while this  
21 finishes transferring.

22 **Randazza text to Dillon:** Just log out of Jungle disk when you leave today.  
23 And erase any emails that have the keys in them. (put them in your gmail).

24 **Dillon text to Randazza:** I've already removed any emails with your PW or  
25 links.

26 **Randazza text to Dillon:** Ok Good.

27 **Dillon text to Randazza:** I'll check the email again tonight. And I'll get Nick to  
28 help me finish a wipe of everything.

**Randazza text to Dillon:** Ok.

**1:06 p.m. Randazza text to Dillon:** Might be today.

**Dillon text to Randazza:** Ok. I might have a hard time getting all of your stuff  
out if they object.

**Randazza text to Dillon:** Ok. Exhibit 421.

**3:10 p.m. Randazza email to Gibson, Henry Leonard, and Brian**

1 **Lowderman:** Given our now openly adversarial relationship, it seems  
 2 appropriate that I withdraw from representing Liberty in any further matters.  
 3 There might be a way I can continue to wind down existing matters, but it's  
 4 going to require a call to discuss it. **Exhibit 329 (EMC000186).**

5 **3:14 p.m. Randazza text to Dillon:** Anything going on?

6 **Dillon text to Randazza:** Yeah. We should talk when you have a minute.

7 **Randazza text to Dillon:** Ok... So they are making it out to be like it might all  
 8 get worked out?

9 **4:05 p.m. Randazza text to Dillon:** Call me.

10 **Dillon text to Randazza:** Hey. Can def not call you ATM.

11 **Randazza text to Dillon:** Ok. Pull the trigger.<sup>12</sup>

12 **4:15 p.m. Randazza text to Dillon:** Right away.

13 **Dillon text to Randazza:** Hold on. I want to make sure the Jungle Disk is  
 14 offline.

15 **Randazza text to Dillon:** It is

16 **Dillon text to Randazza:** Ok

17 **Randazza text to Dillon:** Fischer killed it.<sup>13</sup> Report to RLG office tomorrow. :)  
 18 **Exhibit 421.**

19 Randazza's communications confirm that he was undoubtedly planning his exit from  
 20 Excelsior. The intent of Randazza's email to Gibson on August 29, 2012 was clear—that  
 21 he could no longer represent the Company and that he could only "potentially" work to wind  
 22 up his matters with them, but even that would require a discussion with Gibson. **Exhibit**  
 23 **329 (EMC000186).** Randazza desperately attempts to soften the implications of all the  
 24 communications he had with Dillon prior to sending his resignation email by arguing that he  
 25 was in a different time zone and that he likely sent those communications after his  
 26 resignation email. Other than his self-serving testimony, there is no evidence that  
 27 Randazza being on the east coast would change the time stamps displayed on his  
 28 company email account or on Dillon's phone. Excelsior's email server is set to Pacific Time

<sup>12</sup> Randazza testified that by stating "Pull the trigger," he meant for Dillon to quit. Tr. at 488:12-17.

<sup>13</sup> "Fischer" refers to Jason Fischer, an employee of Randazza Legal Group. Tr. at 489:4-8.

1 and would be entirely unaffected by Randazza's travel. Tr. at 712:19-714:7; 818:16-25;  
2 846:4-847:5. Similarly, the text messages were provided from Dillon's phone, which was in  
3 Nevada at the time of the communications. See Exhibit 421; Tr. 479:1-14.

4 Randazza's other actions are consistent with the fact that he intended to resign on  
5 August 29, 2012. A forensic analysis of Randazza's laptop revealed that he ran software  
6 specifically designed to wipe his laptop on four separate occasions during the last week of  
7 his employment. See Exhibit 305, Holpuch Report at p. 3 of 41. The first time the wiping  
8 software was utilized was on August 28, 2012 at 12:08 p.m. PDT—more than 24 hours  
9 prior to sending his resignation email. Compare Exhibit 305, Holpuch Report at p. 3 of  
10 41 with Exhibit 329. The wiping software also ran twice to completion on August 29, 2012.  
11 *Id.* The evidence at the hearing also revealed that days prior to his resignation, Randazza  
12 had cleaned out belongings from his office and audibly stated "Fuck this shit, I quit" during  
13 a Company happy hour. Tr. at 454:13-18, 715:10-716:1. These are not the actions of  
14 someone who did not intend to resign on the day in question. Given that Randazza  
15 voluntarily resigned his employment he is not entitled to the severance he now seeks under  
16 the Employment Agreement.

17 Randazza also claims Excelsior breached the contract by not paying him a "non-  
18 discretionary" bonus on the Oron settlement funds. As discussed previously, Randazza  
19 was only entitled to receive such a bonus once it was "received by Excelsior." Exhibit 332  
20 at EMC000496. It is undisputed that the Oron settlement funds remain in Randazza's trust  
21 account as disputed funds, thus Excelsior has never received them. Additionally, the  
22 evidence at the hearing established that Excelsior was forced to resettle the Oron litigation  
23 and paid back \$275,000 to Oron as a direct result of allegations raised by Oron regarding  
24 Randazza's malfeasance during the Oron litigation. Indeed, on November 16, 2012 Oron  
25 filed an arbitration demand against Liberty. Exhibit 334. The demand alleged, amongst  
26 other things, that Randazza utilized a hacker to obtain privileged and confidential  
27 documents/information for use in the litigation. Exhibit 334 (EMC000738); Tr. at 768:18-  
28 769:12. Oron also alleged that in contravention of the settlement agreement, Randazza

(and Liberty) did not dissuade others from bringing suit against Oron and actually assisted another company in filing a "copycat" lawsuit against them. **Exhibit 334 (EMC000741)**. As discussed in depth *infra*, Randazza was the sole cause of both of these serious allegations made in the arbitration demand.

Because of these allegations, Excelsior's new counsel engaged in settlement discussions with Oron and eventually Liberty was forced to resettle the Oron case for \$275,000 (which was half of the previous settlement amount of \$550,000). **Tr. at 765:17-768:5, 768:18-769:12**. Randazza's unethical behavior undoubtedly breached his employment agreement with the company and excuses Excelsior from their performance obligations under the contract. *See Brown*, 192 Cal. App. 4th at 277. In light of these facts, Randazza should not be entitled to recover a bonus from the Oron settlement (and even if he was, such a bonus should be on the \$275,000 adjusted settlement amount and not the \$550,000 original settlement value).

Finally, Randazza claims that Excelsior breached its agreement if it has not paid any other settlements it received since Excelsior terminated his employment. As previously stated, Randazza presented no evidence which shows Excelsior received additional settlements which were vested at the time he resigned his employment. Accordingly, he failed to meet his burden of proof with respect to this alleged breach.

#### **4. Wrongful Termination**

Randazza claims he was wrongfully terminated in violation of Nevada public policy. As discussed previously, Randazza's claim fails because there is no evidence that he was terminated or constructively discharged. Instead, Excelsior proved by a preponderance of the evidence that Randazza voluntarily resigned his employment from the company.

Nevada law recognizes a "tortious discharge" exception to the at-will employment doctrine. *Wayment v. Holmes*, 112 Nev. 232, 236, 912 P.2d 816, 818 (1996). "This exception states that '[a]n employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state.'" *Id.* (citing *Vancheri v. GNLV Corp.*, 105 Nev. 417, 421, 777 P.2d 366, 369 (1989)). Terminating an employee for

1 reasons which violate public policy gives rise to an action for tortious discharge. *D'Angelo v.*  
 2 *Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 212 (1991). The Nevada Supreme Court has  
 3 held that "public policy tortious discharge actions are severely limited to those rare and  
 4 exceptional cases where the employer's conduct violates strong and compelling public  
 5 policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900  
 6 (1989)(concluding that a legislative public policy against age discrimination was not  
 7 sufficiently strong to warrant an exception to the at-will employment doctrine). Additionally,  
 8 "recovery for retaliatory discharge under state law may not be had upon a 'mixed motives'  
 9 theory; thus, a plaintiff must demonstrate that his protected conduct was *the* proximate  
 10 cause of his discharge. *Allum v. Valley Bank of Nevada*, 114 Nev. 1313, 1319-20, 970  
 11 P.2d 1062, 1066 (1998)(emphasis added).

12 Randazza's claim that he was wrongfully terminated is meritless because Excelsior  
 13 did not terminate his employment. Instead, as Excelsior executives expected in light of his  
 14 erratic behavior, Randazza resigned his employment. **See Exhibit 329 and discussion**  
 15 ***supra***. Additionally, even if the Arbitrator were to find that Randazza was terminated  
 16 (which Excelsior maintains was not the case), there is adequate evidence to conclude that  
 17 it was warranted in light of the then recently revealed fact that Randazza was negotiating  
 18 the \$75,000 bribe from Oron. His involvement in the Oron bribe negotiations would at least  
 19 amount to a mixed motive for terminating/constructively discharging Randazza which is  
 20 fatal to his wrongful termination claim. *See Allum*, 114 Nev. at 1319-20.

## 21 5. Hostile Work Environment

22 Randazza claims that he was sexually harassed when: (1) Excelsior filmed a scene  
 23 for a pornographic film in his office in April 2012; and (2) when Gibson allegedly performed  
 24 oral sex on another Excelsior employee while riding in Randazza's vehicle after a company  
 25 retreat to Lake Mead in August 2012. Randazza did not prove his claim by a  
 26 preponderance of the evidence because the evidence shows that the scene was not  
 27 offensive to Randazza, unwelcome, or in any way related to his status as a straight male.  
 28 Additionally, despite strong evidence to the contrary, Randazza's testimony is the only



1 evidence that the alleged sex act in his car ever occurred.

2 To prove a *prima facie* case of a hostile work environment under Title VII or Nevada  
3 law, Randazza must show that: (1) he was subjected to verbal or physical conduct of a  
4 harassing nature and based on a protected classification; (2) this conduct was unwelcome;  
5 and (3) the conduct was sufficiently severe or pervasive to alter the conditions of his  
6 employment. *Galdamez v. Potter*, 415 F.3d 1015, 1023 (9th Cir. 2005) (based on race and  
7 national origin); *Nichols v. Azteca Restaurant Enter., Inc.*, 256 F.3d 864, 873 n.4 (9th Cir.  
8 2001) (based on sex). Here, Randazza claims gender-based sex harassment because he  
9 is a heterosexual male. As such, he must prove that any harassment took place "because  
10 of sex." *Nichols*, at 873 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75,  
11 79 (1998) (emphasis added). When hostility is not based on the protected status, it is not  
12 actionable harassment. *See, e.g., Hervey v. Cnty. of Koochingching*, 527 F.3d 711, 722  
13 (8th Cir. 2008) (plaintiff failed to show that her supervisor's conduct, which included  
14 criticism, shouting at her, and changing her reporting relationships, was due to her gender).

15 The primary element of a hostile work environment claim is proof that "the workplace  
16 is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe  
17 or pervasive to alter the conditions of the victim's employment and create an abusive  
18 working environment." *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993). The conduct must  
19 also be both subjectively and objectively offensive. *Faragher v. City of Boca Raton*, 524  
20 U.S. 775, 787 (1998). Accordingly, Randazza must show that he subjectively regarded the  
21 environment as severe and abusive such that it altered his employment conditions. *Burrell*  
22 *v. Star Nursery, Inc.*, 170 F.3d 951, 954-55 (9th Cir. 1999) ("To assert a Title VII claim  
23 based on a hostile work environment, a plaintiff must allege a pattern of ongoing and  
24 persistent harassment severe enough to alter the conditions of employment . . . The  
25 working environment must both subjectively and objectively be perceived as abusive  
26 because of the harassment")(internal citations and quotations omitted).

27 It must be noted that the Company believes Randazza included his sexual  
28 harassment allegation purely to embarrass Gibson, ensure the Company would not make

1 its dispute with Randazza public, and serve as a vehicle to invade Gibson's privacy by  
 2 making spurious allegations. The evidence introduced at the hearing confirms the  
 3 Company's suspicions. After filing the Arbitration Demand, Randazza was in  
 4 communication with Excelsior's Director of Marketing, Chip Carter ("Carter"), and  
 5 questioned whether Gibson had sent the state bar complaints Excelsior filed against  
 6 Randazza to the media or any of his clients. **Tr. at 332:16-335:22; John Thurston Carter**  
 7 **("Chip") Deposition Transcript at Exhibit 89 (Bates No. QUIVX002016-2017).** When  
 8 Carter told Randazza that he had not sent them to the media because Randazza's  
 9 allegations raise too many questions and Gibson didn't want the sexual harassment stuff to  
 10 be public, Randazza responded by stating that Gibson's fear was "[a] fear I tried to foster."  
 11 *Id.* Additionally, during a conversation Randazza had with Excelsior executive Brian  
 12 Dunlap ("Dunlap") while at the Phoenix Forum in April 2013, Randazza told Dunlap "[i]f I  
 13 have to file and fight for the \$200,000 I deserve, I might as well go for \$4 million." **Tr. at**  
 14 **381:3-384:4; Brian Dunlap Deposition Transcript at Exhibit 302 (EMC003473).**  
 15 Randazza also conceded to Dunlap that his Arbitration Brief was "out there." *Id.* Both of  
 16 these instances indicate that the sexual harassment allegations Randazza asserts are not  
 17 centered in a pursuit of justice, but are actually a means by which Randazza felt he could  
 18 bully Excelsior and Gibson.

19 With regard to the allegations relating to the scene in his office, Randazza claims  
 20 that when he was informed that Excelsior was going to use his office in a scene prior to  
 21 filming, he believed the warning to be in jest. Randazza claims that the next day, however,  
 22 he discovered that his office had been used in filming the scene, including the desk where  
 23 he keeps pictures of his children. Randazza also claims that the next day he complained  
 24 about the use of his office to Gibson, who responded that Randazza should not be  
 25 "butthurt"<sup>14</sup> about it. A review of the text message exchange between Gibson and  
 26 Randazza shows that Randazza was not actually offended by having a scene shot in his  
 27

28 <sup>14</sup> While Randazza appears to claim that the use of this term offended him, he admits to using the term himself. **Tr. at 326:4-10.**



1 office. In fact, in his typical crude manner, Randazza encouraged it—as evidenced by the  
 2 fact that after he was alerted that his office would be used in a scene, Randazza texted  
 3 Gibson “Don’t get jizz on my briefs.” **Exhibit 330 (EMC000459-460), Text Message**  
 4 **Exchange between Marc Randazza and Jason Gibson Texts 23605 and 23622 (“out”**  
 5 **messages are from Gibson, “in” messages are to Gibson from Randazza).**<sup>15</sup>  
 6 Randazza even stated that he didn’t want the mess cleaned up in Text 23662. He later  
 7 stated “I’m glad to help out if we need a place to shoot. I’d just ask that I get some notice so  
 8 I can prep the place for it next time.” *Id.* at **Text 23774.**

9 Excelsior fully acknowledges that it did film a scene for an adult film in Randazza’s  
 10 office. However, the evidence established that this is not unique; Excelsior commonly uses  
 11 other areas of its facilities to film scenes including offices, the fitness center, and cafeteria.  
 12 **Tr. at 681:15-682:19, 857:17-858:16, 943:7-14, 955:8-956:3.** In fact, at that time,  
 13 customers were requesting more variety as to filming locations. *Id.* at **681:15-682:19.**  
 14 Nothing about the scene shot in Randazza’s office was out of the ordinary, and after the  
 15 scene was completed his office was cleaned and sanitized as per Company protocol. *Id.* at  
 16 **956:4-957:22.** Filming in an office has never been considered harassing conduct before.

17 Further, two additional facts clearly contradict Randazza’s contention that the filming  
 18 in his office was offensive, unwelcome, or in any way related to his status as a straight  
 19 male. First, Randazza admitted he offered up his own personal residence for use in filming  
 20 pornographic scenes prior to the filming in his office. *Id.* at **339:13-340:12; 683:23-684:17.**  
 21 Randazza not only admitted to making this overture to Gibson and others, but one of  
 22 Excelsior’s scene directors additionally testified Randazza had frequently made this offer  
 23 and that he, in fact, communicated directly with Randazza regarding the fact that  
 24 Randazza’s office was going to be used for filming with no objection from Randazza. **Tr. at**  
 25 **953:14-23; 954:10-955:1, 957:23-958:25.**

26 Additionally, Randazza’s testimony to his offense at the thought that his desk had  
 27

28 <sup>15</sup> While many of the statements in the text messages are crude, this exchange shows that this was  
 not something that subjectively offended Randazza.

1 been used in a pornographic scene is utterly belied by the fact that he purchased a couch  
 2 from Excelsior that had been used in multiple pornographic films, placed that couch in the  
 3 home he occupied with his family, and boasted to visitors that pornography had been filmed  
 4 on the couch. *Id.* at 338:2-338:18. Randazza even sent a photograph of his scantily-clad  
 5 wife on the couch to Gibson—which, of course, flies in the face of his allegations that  
 6 Gibson had any issues with the fact that he was a straight male. **Exhibit 315; Tr. at**  
 7 **338:19-339:12.** While Randazza now claims he made formal complaints to then Human  
 8 Resources manager, Kirk Addison, Addison denies ever receiving such a complaint. *Id.* at  
 9 **916:9-23, 917:3-5.** The truth is that Randazza's only complaints in April 2012 about filming  
 10 a scene in his office was that his effects had been cleaned off of his desk and not properly  
 11 replaced. **See Exhibit 330 (Texts 23782, 23783).**

12 As for the alleged sex act in Randazza's car, the Company denies that Randazza  
 13 witnessed anything sexually inappropriate between Gibson and the other Excelsior  
 14 employee on August 9, 2012, or any other day. In fact, the only person that actually  
 15 supports Randazza's version of events is Randazza.<sup>16</sup> Gibson testified that the alleged sex  
 16 act did not occur. **Tr. at 687:12-688:14.** Cameron Frost, another individual who was in the  
 17 car that day also denies that Gibson engaged in the alleged sex act. **Exhibit 309**  
 18 **(Declaration of Cameron Frost).** The evidence shows that the employee who the act was  
 19 allegedly performed on, David McCoig, was severely inebriated and ill on the car ride that  
 20 day—making Randazza's version of the drive home entirely unbelievable. **Exhibit 309;**  
 21 **Tr. at 688:12-691:2.** Additionally, Randazza never made formal complaints about the  
 22 alleged sex act to Gibson or Addison. **Tr. at 690:24-691:2; 916:24-917:15.**

23 Finally, all of Randazza's allegations of the deterioration of his relationship with  
 24

25 <sup>16</sup> The only witness testimony Randazza provided in support of his claim was from two individuals  
 26 (Ron Green and Cari Piper) that testified to hearsay statements regarding the alleged act—one of  
 27 which even had markedly different facts than the allegations Randazza currently makes by claiming  
 28 that the wrong person performed the sex act. **Tr. at 945:16-946:1.** Additionally, Cari Piper, a  
 former Excelsior employee who recently resigned from the company when they changed her job  
 duties, admitted to having an "axe to grind" against Excelsior CEO Jason Gibson. *Id.* at 938:9-  
 940:21. Accordingly, her testimony should be taken with the appropriate grain of salt.

Gibson as a result of these alleged events are belied by evidence. Randazza admitted to the close relationship he and Gibson shared during his employment with the company. It included many friendly gestures between the two, regular social interaction outside of the office, and Randazza and his family staying with Gibson for extended periods of time. *Tr. at 303:2-306:7, 312:9-23; Exhibit 318-319.* An examination of their relationship in early August shows that they still shared that close relationship including dinners, a boat excursion with Randazza and his children, and time spent at Gibson's home. *Tr. at 312:24-314:15, 438:1-446:6.* What is also evident is that it was not until August 13, 2012—the day Gibson discovered Randazza negotiated a bribe for himself —when the relationship began to turn. *Tr. at 446:7-450:3.* As is evident from the foregoing, there was no harassment and, as Randazza asserted to a third party, the sexual harassment allegations were only included to foster a fear in Excelsior of making their dispute with Randazza public. In light of these facts, Randazza cannot establish that he was subject to hostile working environment which altered the terms and conditions of his employment.

#### 6. Retaliation

Excelsior is further entitled to judgment in its favor with respect to Randazza's claim that he was terminated to retaliate against him for reporting sexual harassment. An employer cannot retaliate against an employee for "oppos[ing] any practice made an unlawful employment practice" by Title VII. 42 U.S.C. § 2000e-3(a). In order to establish a *prima facie* case of retaliation, Randazza must show: (1) involvement in a protected activity, (2) a "materially adverse" employment action, and; (3) a causal link between the two events. *See Brooks v. City of San Mateo*, 229 F.3d 917, 928 (9th Cir. 2000) (citing *Payne v. Norwest Corp.*, 113 F.3d 1079, 1080 (9th Cir. 1997)); *see also Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 68 (2006) (setting forth the "materially adverse" standard). "The employee's statement cannot be 'opposed to an unlawful employment practice' unless it refers to *some* practice by the employer that is allegedly unlawful." *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983).

The U.S. Supreme Court recently clarified the standard of proof with respect to

1 causation in a retaliation case, holding that "Title VII retaliation claims must be proved  
 2 according to traditional principles of but-for causation, not the lessened causation  
 3 [motivating factor] test. This standard requires proof that the unlawful retaliation would not  
 4 have occurred in the absence of the "alleged wrongful action or actions of the employer."  
 5 *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013)). The Court  
 6 recognized that "claims of retaliation are being made with ever-increasing frequency" and  
 7 that "lessening the causation standard could also contribute to the filing of frivolous claims,  
 8 which would siphon resources from efforts by employer, administrative agencies, and  
 9 courts to combat workplace harassment." *Nassar*, 133 S. Ct. at 2531.

10 Randazza claims his alleged termination was retaliation for complaining about the  
 11 scene being filmed in his office and a non-existent complaint alleging oral sex occurred in  
 12 his vehicle. Randazza's retaliation claim is meritless for several reasons. First, Randazza  
 13 cannot show that he participated in a protected activity. **Tr. at 687:8-11, 685:16-686:4,**  
 14 **690:24-691:2, 916:9-917:5.** At most, Randazza claims he complained about his office  
 15 having been used to film a pornographic scene. Randazza, an attorney, did not claim that  
 16 this constituted sexual harassment. Rather, he merely complained about his office having  
 17 not been put back together the way he liked it. **See Exhibit 330, Texts 23782, 23783.**  
 18 This is not a protected complaint. *Crown Zellerbach Corp.*, 720 F.2d at 1013 (activity must  
 19 refer to something unlawful). Additionally, other than his own self-serving testimony, there  
 20 is no evidence that Randazza ever issued a complaint to any executive at the company  
 21 regarding the alleged sex act that occurred in his vehicle. **Tr. at 687:8-11, 685:16-686:4,**  
 22 **690:24-691:2.** Randazza's testimony has proven to be untrustworthy and Mr. Addison  
 23 denied that Randazza ever complained to him about Gibson. ***Id.* at 916:9-917:5**

24 Additionally, Randazza cannot prove that he would not have been terminated but  
 25 for making a complaint of sexual harassment against Gibson as Title VII requires. The  
 26 preponderance of the evidence establishes that the root of the discord between Randazza  
 27 and Gibson stems from the fact that Randazza was caught with his hand in the proverbial  
 28 cookie jar when he presented Gibson with a settlement agreement providing for a \$75,000

1 bribe to Randazza (on top of the bonus of \$150,000 he already potentially would be entitled  
 2 to receive). Randazza never suffered an adverse employment action because he willingly  
 3 resigned his employment on August 29, 2012. **See Exhibit 329 and discussion *supra*.**  
 4 Indeed, after being caught negotiating the bribe and acting in blatant contradiction to the  
 5 ethical codes that bind attorneys by taking control of Excelsior's funds and becoming  
 6 "adverse" to his client, Randazza decided to quit. *Id.*

7 While Randazza may claim that this was a constructive discharge and not a true  
 8 resignation, he produced nothing other than self-serving testimony in support of this  
 9 allegation. Indeed, in the same month of August, Gibson had taken Randazza and his  
 10 children to the lake, had gone out to eat with Randazza, and still considered himself  
 11 Randazza's friend. **Tr. at 313:10-314:15, 438:1-445:3.** Finally, even if the Arbitrator were  
 12 to find that Randazza was subject to an adverse employment action, Randazza can point to  
 13 no evidence which will establish the "but for" causal connection between his alleged  
 14 complaints and the alleged employment action—let alone the but-for causal connection  
 15 necessary in order to establish a retaliation claim. *Nassar*, 133 S. Ct. at 2533.

16 **D. EXCELSIOR ESTABLISHED ITS COUNTERCLAIMS AGAINST**  
 17 **RANDAZZA BY A PREPONDERANCE OF THE EVIDENCE**

18 **1. Legal Malpractice, Breach of Fiduciary Duty, and Tortious Breach**  
**of the Duty of Good Faith and Fair Dealing**

19 The elements of a legal malpractice claim are: (1) an attorney-client relationship  
 20 between the parties; (2) a duty owed to the client by the attorney to use such skill,  
 21 prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and  
 22 performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being  
 23 the proximate cause of the client's damages; and (5) actual loss or damage resulting from  
 24 the negligence. *Day v. Zubel*, 112 Nev. 972, 922 P.2d 536 (Nev. 1996); *Mainor v. Nault*,  
 25 120 Nev. 750, 774, 101 P.3d 308, 324 (Nev. 2004); *see also Hall v. Kalfayan*, 190  
 26 Cal.App.4<sup>th</sup> 927 (Ct. App. 2010)(same elements under California law). The Nevada Rules of  
 27 Professional Conduct and the California Rules of Professional Conduct are evidence of the  
 28 standards of care to which attorneys are held. *Mainor*, 120 Nev. at 769; *City & Cty. Of San*



1 *Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20, 25 (Cal. 2006). Respondent's  
 2 counterclaims for Breach of Fiduciary Duty (First Claim For Relief), Tortious Breach of the  
 3 Duty of Good Faith and Fair Dealing (Fourth Claim For Relief), and Legal Malpractice (Fifth  
 4 Claim For Relief) are essentially all claims for legal malpractice (though they may give rise  
 5 to different forms of relief), and are therefore analyzed as such. *Stalk v. Mushkin*, 125 Nev.  
 6 21, 28-29, 199 P.3d 838, 842-43 (Nev. 2009); *Oasis W. Realty, LLC v. Goodman*, 250 P.3d  
 7 1115, 1120-21 (Cal. 2011).

8 The parties do not dispute that an attorney-client relationship existed and that  
 9 Randazza owed to the Company(ies) a duty to use such skill, prudence and diligence as  
 10 lawyers of ordinary skill and capacity possess in exercising and performing his job as  
 11 Excelsior's General Counsel. The standard of care below which an attorney's conduct  
 12 should not fall is generally established through expert testimony. *Flatt v. Superior Court*, 9  
 13 Cal. 4th 275, 297, 885 P.2d 950, 963 (1994); *Mainor*, 120 Nev. at 767. The evidence on the  
 14 record establishes that Randazza breached his duty by improperly negotiating with adverse  
 15 parties to retain his firm while litigating against them on behalf of Liberty and by failing to  
 16 disclose conflicts of interest. This occurred during his settlement negotiations with TNAFLix  
 17 and MegaUpload, his actions throughout the Oron case, and by engaging in conflicts of  
 18 interest with various clients, amongst other unethical behavior.

#### 19 a. TNAFLIX Litigation

20 Excelsior proved by a preponderance of the evidence that Randazza committed  
 21 malpractice and breached his fiduciary duties with respect to his handling of the TNAFLix  
 22 matter. As set forth in further detail herein, Randazza tainted settlement discussions by  
 23 negotiating to personally receive a monetary payment from TNAFLix in exchange for not  
 24 suing the company in the future. During the same negotiations, Randazza proposed and  
 25 negotiated with TNAFLix regarding the potential sale of the site to one of his other clients  
 26 which would have paid him a lucrative "broker fee" had the sale gone through. Randazza  
 27 engaged in this behavior without ever disclosing it to or seeking Excelsior's consent.

28 In December 2010 and January 2011 Randazza and Val Gurvits ("Gurvits") of

In order to conflict me out of future matters, I suggest this: Your firm retains me as "of counsel" to you. I get \$5k per month (for six months) paid to me, from you (TNA will reimburse you, I presume). I will render advice on TNA and TNA only, and I'll be Chinese walled from your other clients so that other conflicts are not created. ... That way, I'm adequately compensated for my loss of major potential work, and I'm conflicted out of acting adversely to TNA.

**Exhibit 356.**



1  
2 On January 12, 2011, Randazza purportedly discovered that he was ethically  
3 prohibited from discussing limitations on the right to practice law during the course of  
4 settlement negotiations on behalf of a client, and emailed Gurvits to say that he could no  
5 longer discuss it. Nevertheless, Randazza recommended the following:

6 Like I said before, if TNA wants to hire me *\*after\** settlement, on terms that we  
7 discuss *\*after\** settlement, then my phone line will be open. However, it  
8 seems that if we place any part of a 'buyoff' as a condition of settlement, then  
all four of us could wind up in bar trouble. I'm certainly not risking it. **Exhibit**  
**357.**

9 Two things are clear from this sequence of events. First, Randazza put his client's interest  
10 (Excelsior) to the side in favor of negotiating for himself a potential \$30,000 payment to  
11 "conflict him out of acting adversely to TNA" and a potential \$375,000 broker fee for from  
12 the sale of the site. Second, Randazza's communication that his retention would need to  
13 take place *"\*after\*"* a settlement was finalized was insincere and meant to cover his true  
14 intentions.

15 On February 1, 2011 Liberty signed a Settlement Agreement with TNAFlix in which  
16 they agreed to dismiss their claims against TNAFlix in exchange for a payment of \$50,000.  
17 **Exhibit 360; Tr. at 370:16-371:10.** The very next day (February 2), Randazza sent an  
18 email to Gurvits asking if TNAFlix wanted a retainer letter from him and asking if Gurvits  
19 was working on a broker agreement for the sale. **Exhibit 361; Tr. at 371:8-372:18.** On  
20 February 11, 2011, Randazza also emailed a draft retainer letter for TNAFlix to sign, which  
21 required a \$36,000 retainer deemed to be earned upon receipt. **Exhibit 362; Tr. at 373:1-**  
22 **374:10.** The retainer letter also had a provision in which TNAFlix would agree that  
23 Randazza and Boston Legal Group would have the exclusive right to sell the company and  
24 any of its online assets for 10% of the sales price. **Exhibit 362; Tr. at 374:11-375:15.**  
25 Randazza later emailed Gurvits pleading that he prevail upon his clients that "time is of the  
26 essence." **Exhibit 363; Tr. at 375:16-376:7.** Randazza offered no explanation for the  
27 changed terms (which raised the amount of fully earned upon receipt payment to Randazza  
28 to \$36,000). On February 15, 2011 Randazza also prepared and sent Gurvits a draft

1 broker agreement for the potential sale. **Exhibit 364; Tr. at 376:14-377:19.** While the  
 2 settlement was completed, the side deals that would have benefitted Randazza were never  
 3 finalized. **Tr. at 378:6-10.**

4 It is undisputed that Randazza never received written consent from Liberty to  
 5 negotiate for a monetary payment to Randazza Legal Group in connection with the TNAFlix  
 6 dispute. **Tr. at 351:20-23.** Randazza also never informed Liberty orally or in writing that he  
 7 was negotiating and proposing to broker the sale of TNAFlix. **Id. at 352:23-3; 353:14-24.**  
 8 Excelsior denies ever having been informed that Randazza was engaging in these  
 9 unethical negotiations nor did it authorize him to engage in the same. **Id. at 698:3-699:25.**

10 After Excelsior disclosed the improper negotiations to the State Bar but prior to  
 11 Excelsior disclosing in this litigation that it had obtained Randazza's email communications  
 12 with opposing counsel in the TNAFlix matter, Randazza reported to the bar that after being  
 13 offered a bribe by opposing counsel to never sue his client again, Randazza responded by  
 14 informing, "both Mr. Gurvits and Gibson that Randazza would not accept payment in  
 15 exchange for a limitation on who Randazza could represent or not represent in the future."  
 16 **Exhibit 372 at EMC001606 and Tr. at 240:18-243:2.** After making this blatant  
 17 misrepresentation to the Bar, and upon discovering that Excelsior had copies of his actual  
 18 communications with opposing counsel in the case, Randazza was forced to abandon the  
 19 position he took with the State Bar – that Gurvits offered him a payment to conflict him out  
 20 and he refused that overture. As the Arbitrator knows, Randazza's story at arbitration  
 21 became that he did negotiate for a payment to conflict himself out and to broker a sale of  
 22 TNAflix, but it was all make-believe and part of a negotiation strategy to somehow get  
 23 Liberty more money. Randazza's continually evolving story is belied by the fact that after  
 24 the TNAflix matter was settled, Randazza drafted and forwarded agreements for TNAflix to  
 25 retain him to conflict him out and to serve as a broker. **Tr. at 370:24-379:18.**

26 As detailed in Dennis Kennedy's Expert Report, Randazza's actions while settling  
 27 the TNAflix matter breached his fiduciary duty and failed to comport to the standard of care  
 28 expected of him – Randazza failed to keep Excelsior informed of significant developments,

1 Randazza failed to properly disclose his personal interest in the matter, and Randazza  
 2 improperly negotiated to restrict his practice. **Exhibit 304, Kennedy's Report at ¶¶ 17-**  
 3 **21.13; see also Tr. at 1003:20-1016:18.** California Rule of Professional Conduct ("Cal.  
 4 RPC") 3-500 provides that lawyer "shall keep a client reasonably informed about significant  
 5 developments relating to the employment or representation." In the course of negotiating  
 6 a settlement, a lawyer is required to communicate to his client all amounts, terms, and  
 7 conditions of any written (and significant oral) offer of settlement. Cal. RPC 3-510(A)(2);  
 8 Discussion to Cal. RPC 3-510. In order to prevent conflicts, Cal. RPC 3-310(B)(4) provides  
 9 that a lawyer "shall not accept or continue representation of a client without providing  
 10 written disclosure to the client" where the lawyer has "a legal, business, financial, or  
 11 professional interest in the subject matter of the representation."<sup>17</sup> Additionally, Cal. RPC  
 12 1-500(A) provides that a lawyer shall not "be a party to or participate in offering or making  
 13 an agreement, whether in connection with the settlement of a lawsuit or otherwise, if the  
 14 agreement restricts the right of [the lawyer] to practice law."<sup>18</sup> The prohibition against  
 15 restricting a lawyer's right to practice law also prohibits instances where a lawyer  
 16 separately, though simultaneously, negotiates to be retained by an opposing party in  
 17 litigation during settlement negotiations even if the retention occurs after the settlement.  
 18 See e.g., *Cardillo v. Bloomfield 206 Corp.*, 988 A.2d 136, 139-40 (N.J. App. 2010); *In re*  
 19 *Brandt/Griffin*, 10 P.3d 906, 918-19 (Ore. 2000).

20 Kennedy's testimony summarized his conclusions as to Randazza's unethical  
 21 actions during the TNAflix matter as follows:

22 There is a failure to communicate to his client, Liberty, what he was doing.  
 23 He has a personal conflict in ... negotiating to settle the agreement, while  
 24 simultaneously negotiating a payment to himself, which I say it's either a

25 <sup>17</sup> "The primary purpose of this prophylactic rule is to prevent situations in which an attorney might  
 26 compromise his or her representation of the client in order to advance the attorney's own financial  
 or personal interests." *Santa Clara Cty. Counsel Attys. Assn. v. Woodside*, 869 P.2d 1142, 1153  
 (Cal. 1994).

27 <sup>18</sup> "[T]he practice, in connection with settlement agreements, of proposing that a member refrain  
 28 from representing other clients in similar litigation, is prohibited. Neither counsel may demand or  
 suggest such provisions nor may opposing counsel accede or agree to such provisions." Discussion  
 Cal. RPC 1-500.

1       bribe, because that language is used, or to be retained by TNA concurrent  
 2       with or immediately after the settlement. And then there's the matter of him  
 3       restricting or agreeing to restrict his right to practice law, which is prohibited  
 4       by Rule 5.6 of the Nevada Rules of Professional Conduct and by comparable  
      California Rule of Professional Conduct [Cal RPS 1-500]. And, lastly, the  
      conflict in negotiating the broker's agreement and commission while  
      simultaneously negotiating the settlement agreement.

5       The essential conflict here are three. It's a failure to communicate with the  
 6       client and tell the client, well, here is what I'm doing. It is a conflict because  
 7       he has a personal interest in both the future retention and in the receipt of a  
      commission if there is a sale. And, lastly, the restriction on the right to  
      practice, which is just flatly prohibited by the rules. So those are the three  
      issues and I think he violated his duty to the client in each one of those.

8  
 9       **Tr. at 1007:14-1008:20.**

10       Accordingly, Randazza should have provided written disclosure to the Company that  
 11       he was engaging in these negotiations. In light of his personal business interest in the  
 12       retention of his firm and in brokering a deal that would have paid him an exorbitant amount  
 13       of money, a conflict existed between him Liberty which required disclosure and informed  
 14       consent in order for him to continue his representation of the Company. The evidence  
 15       reveals that such disclosure and consent never occurred. Finally, as Mr. Kennedy  
 16       concluded, his negotiation to refrain from representing other clients in similar litigation  
      against TNAFlix in the future is undoubtedly prohibited by the rules.

17       Randazza's defense to this matter is that he never actually intended to, nor did he  
 18       actually consummate an agreement with TNAFlix for either the restriction of his practice or  
 19       brokering of the TNAFlix sale he proposed. Randazza's argument misses the mark for  
 20       multiple reasons. As an initial matter, had Randazza's only motivation been to get a better  
 21       settlement for his client, he would not have prepared the retention and broker agreements  
 22       and sent them to Gurvits after the settlement was completed.<sup>19</sup>

23       Randazza's expert, Ellen Peck, testified that there was no personal interest conflict  
 24       because of her acceptance of Randazza's "bluffing" narrative and the fact that the  
 25

26       <sup>19</sup> One of Randazza's own ethics expert testified that he saw no intent by Randazza to consummate  
 27       any of the improper deals he was asked to review but was later forced to retreat from that position  
      when he acknowledged that sending an agreement to an opposing party evidences intent to  
      consummate. **See Tr. 1197:13-1198:2.**



1 brokerage and retention agreements were not incorporated into the settlement agreement  
 2 and were never actually consummated prior to the settlement of the TNAFlix litigation.<sup>20</sup> Tr.  
 3 at 1307:3-1310:2. Indeed, Ms. Peck's entire opinion that there was no conflict is premised  
 4 on her theory that Randazza was not negotiating for a payment in order to restrict his  
 5 practice but legitimately negotiating for representation of a new client. Ms. Peck's premise  
 6 is incorrect because Randazza and Gurvits' communications show the true intent was  
 7 Randazza to not be adverse to TNAFlix in the future. Indeed, Gurvits' original reason for  
 8 raising the issue was that "there is no way to prevent others from suing [TNAFlix] once this  
 9 action is settled." **Exhibit 350.** Randazza's subsequent representation that he would be  
 10 "willing to be conflicted out of future cases against TNA" if the price was right ("I'm gonna  
 11 want at least used BMW money") shows that this was undoubtedly the goal of the potential  
 12 agreement between he and TNAFlix. **Exhibit 352; Exhibit 356.**

13 As to Ms. Peck's opinion that the failure to consummate prior to the settlement  
 14 occurring absolves Randazza of any personal interest, not only is her opinion on this matter  
 15 illogical, but she admits she had no authority to support that interpretation of the rule. Tr. at  
 16 **1309:8-1311:4.** Kennedy's opinion as to why a conflict existed is clear:

17 Rather than focusing on Liberty's interests, which he was required to do as its  
 18 fiduciary, Mr. Randazza was motivated by his own personal gain in the form  
 19 of earning a non-refundable, earned-upon receipt retainer of \$36,000 as soon  
 20 as he settled the TNA Matter. By so doing, he ... compromised the trust and  
 21 confidence reposed in him by Liberty. Mr. Randazza was unable to exercise  
 22 independent professional judgment and provide unbiased advice to Liberty in  
 23 settling the TNA Matter given his personal interest in being retained by TNA  
 24 for a substantial sum immediately upon settlement of the TNA Matter. He  
 25 was required to disclose those interest and the resulting conflict to Liberty in  
 26 writing pursuant to California RPC 3-310(B)(4), 3-500 and 3-510 so that  
 27 Liberty could intelligently decide whether and how to proceed with settling the  
 28 TNA Matter. Aside from the impermissible restriction on his right to practice  
 law and person conflict of interest, Mr. Randazza should not have broached  
 the possible multi-million dollar sale of TNA with Mr. Gurvits while attempting  
 to settle the TNA Matter, which created another personal conflict of interest  
 for him ... The prospect of earning up to \$375,000 undoubtedly clouded Mr.  
 Randazza's independent professional judgment and his ability to give

<sup>20</sup> Ms. Peck also conceded that her report was based upon her understanding that Excelsior was aware of the bribes and had knowledge that Randazza was negotiating a bribe. As was evident at the hearing, that is not true—making her entire report based upon this faulty premise. Tr. at **1283:5-1286:23.**



1 unbiased advice to Liberty in settling the TNA Matter; it was impossible for  
 2 him to separate one from the other, as he acknowledged in the January 20,  
 3 2011 email that he sent to Mr. Gurvits. While Mr. Randazza was only due to  
 4 earn twenty-five percent (25%) of the TNA Settlement, or twelve thousand  
 five hundred dollars (\$12,500), pursuant to his employment agreement with  
 Liberty, he was hoping to earn up to thirty (30) times that amount by brokering  
 sale of TNA to another one of his clients.

5 **Exhibit 304, Kennedy's Report at ¶¶ 21.5 – 21.9.**

6 Finally, Ms. Peck takes the position that (1) there is no evidence which shows that  
 7 Randazza proposed or agreed to restrict his right to practice and (2) that Kennedy's report  
 8 confuses agreeing to refrain from representing other clients against an TNAFlix with  
 9 agreeing to represent TNAFlix in the future without express reservations. As discussed  
 10 previously, **Exhibit 352 and 356**, leave no doubt that the true intent of the deal he was  
 11 arranging with TNAFlix was to not represent other clients against TNAFlix in the future.  
 12 When presented directly with these Exhibits, Ms. Peck admitted that it was "close" but not  
 13 "over the line" and then wrestled to find a distinction between Randazza agreeing to be  
 14 conflicted out of future cases and agreeing to not sue TNAFlix in the future. **Tr. at 1287:3-**  
 15 **1297:22.** Her attempts to do so were entirely unpersuasive. *See id.* When Ms. Peck was  
 16 questioned for an example of an offer that would violate Cal. RPC 1-500(A), surprisingly  
 17 she cited as an example the offer that Gurvits made to Randazza to not represent anybody  
 18 against TNAFlix in the future in exchange for \$5,000. **Tr. at 1304:22-1305:25.**

19 Q: So one example you gave was Mr. Gurvits' offer to Mr. Randazza in  
 the TNAFlix, and that was a payment of \$5,000?

20 A: For his agreement not to ever take clients against TNAFlix again.

21 Q: Right. Mr. Randazza, in the e-mails that we looked at, was just  
 countering Mr. Gurvits' offer, correct?

22 A: Well, I don't think that he was countering Mr. Gurvits' statement or offer  
 23 in a way that was inappropriate under the rule. He didn't say that he  
 would limit his practice geographically or that he would limit his  
 practice by saying—by not taking any clients.

24 ***Id.* at 1305:12-25.** In other words, even though all Randazza was doing was countering  
 25 Mr. Gurvits' previous offer and requesting additional compensation for himself in order to  
 26 not represent clients against TNAFlix, Ms. Peck would only find a violation if Randazza  
 27 utilized the proverbial "magic words" she needs to hear in order to find a violation. Such an

1 interpretation is as illogical as it is unpersuasive.<sup>21</sup>

2 **b. MegaUpload**

3 Excelsior established at the hearing that Randazza also committed malpractice and  
4 breached his fiduciary duties with respect to his handling of the MegaUpload litigation. As  
5 set forth in further detail herein, Randazza tainted settlement negotiations when he solicited  
6 a monetary payment from MegaUpload in exchange for conflicting him out of future  
7 litigation against the site. Randazza failed to disclose this side-negotiation to Excelsior.

8 By way of reminder, Randazza represented Liberty in a copyright infringement  
9 dispute against MegaUpload in 2011. **Tr. 380:10-14.** Ira Rothken ("Rothken") and Venkat  
10 Balasubramani ("Balasubramani") represented MegaUpload in that matter. **See Exhibit**  
11 **53.** In August 2011, the parties attended a mediation in the matter and the parties  
12 eventually settled in September 2011 after exchanging multiple drafts of an agreement.  
13 During the course of those negotiations, Rothken expressed an interest in precluding  
14 Randazza from pursuing future claims against MegaUpload.

15 On August 22, 2011, Randazza responded to the interest in taking him out of "future  
16 games" by stating:

17 In order to address any of your clients concerns about future suits, I am  
18 blocking off some time on September 5, 2011 (which should be sufficiently  
19 beyond the wire date for my client to consider the matter closed). I will make  
20 myself available for an hour ... to have a conversation with your client about  
21 assisting them in putting some protections in place to counter future attacks  
22 from other companies. I think that I have some good ideas, which would  
23 prove useful to them, and which may act as a prophylactic (if implemented)  
24 from future infringement suits. Naturally, to share those ideas, I will need  
25 Mega to share some confidential information with me. And, I believe that  
26 possession of that information in that context will place me in a position of not  
27 being able to represent other companies against them, as the receipt of that  
28 confidential information in the course of representation would make it  
unethical for me to later represent another party against them. **Exhibit 53**  
**(ECM003461).**

21 It is irrelevant whether Randazza was actually successful in getting TNAflix to enter into the agreement to restrict his practice. Kennedy testified that "the rule says lawyers may not propose and may not agree to. And when a matter like that comes up, I mean sometimes a lawyer will propose that because a lawyer is ignorant of what the rule says. But the other lawyer has to tell you, Look, you can't propose that, it violates the rule, and I can't even consider it." **Tr. at 1011:9-20.**

1 Randazza went on to state that while he could not enter into an agreement to conflict  
2 him out while the case was pending:

3 [T]he same ethics that do not make it possible for me to cut corners on the  
4 'conflict out' provisions will be in place after the agreement is signed. I did  
5 not get where I am by having a reputation for being someone who would stab  
6 others in the back.

7 *Id.*; see also Tr. at 380:15-382:22. Over the next several days, the parties continued to  
8 engage in communications which reveal the intent to restrict Randazza's right to practice  
9 law. See Exhibit 53 (ECM003458-60); Tr. at 382:23-383:3.

10 Under a substantially similar analysis as the facts in the TNAFlix matter, Randazza's  
11 conduct implicates Cal. RPC 1-500(A)(offering or agreeing to restrict right to practice), Cal.  
12 RPC 3-310(B)(4)(personal interest conflict), and Cal. RPC 3-500 and 3-510 (informing  
13 client of significant developments). As was the case with TNAFlix, Randazza breached his  
14 fiduciary duty and committed malpractice by (1) failing to communicate with Liberty about  
15 his negotiation to be retained by MegaUpload immediately after settlement; (2) having a  
16 personal conflict of interest in settling the MegaUpload matter while simultaneously  
17 negotiating to be retained by MegaUpload immediately after settlement;<sup>22</sup> and (3)  
18 improperly engaging in negotiations to restrict his right to practice law by offering to  
19 "represent Megaupload immediately after settling the Megaupload Matter (an indirect  
20 restriction of his right to practice law)." Exhibit 304, Kennedy's Report at ¶¶ 50.1-50.6.

21 The fact that Randazza sought to avoid a violation of California RPC 1-500(A) by  
22 claiming that his representation of MegaUpload would be addressed after the settlement  
23 was complete "does not change the fact that the matter was discussed at length during  
24 settlement negotiations for the Megaupload matter." *Id.* at ¶ 50.2. By pursuing retention by  
25 MegaUpload, Randazza acted contrary to Liberty's interest and created a personal conflict

26 <sup>22</sup> "Mr. Randazza should have refrained from discussing any potential future work for Megaupload.  
27 The prospect of earning \$5,000 for a 1-hour phone call with Megaupload and the likelihood of future  
28 work for Megaupload, created a personal conflict of interest for Mr. Randazza that he was required  
to disclose in writing pursuant to California RPC 3-310(B)(4), 3-500 and 3-510 so that Liberty could  
decide whether Mr. Randazza was capable of providing unbiased advice and exercising  
independent professional judgment." Exhibit 304, Kennedy's Report at ¶¶ 50.6.

1 of interest that he should have disclosed to Liberty in writing. *Id.* at ¶¶ 50.4-50.6. In failing  
2 to do so, Randazza undoubtedly breached the duties he owed to the Company.

### 3 c. ORON Litigation

4 Randazza committed malpractice and breached his fiduciary duties in various ways  
5 throughout the course of the Oron litigation. As set forth in further detail herein, Randazza  
6 tainted settlement negotiations when he solicited a \$75,000 payment from Oron in  
7 exchange for conflicting him out of future litigation against that company and by seeking  
8 information from an individual who was utilizing a hacker to obtain confidential information  
9 about Oron. Randazza also fell below the standard of care by entering into personal  
10 transaction with his client without making adequate disclosure to the Company, by  
11 breaching the Oron settlement agreement without disclosing and seeking informed consent  
12 from the company, and concurrently representing Porn Guardian in negotiations against  
13 Oron while also negotiating on Liberty's behalf.

#### 14 i. Unethical Negotiations

15 In 2012, Randazza filed suit against Oron alleging that Oron (a file-sharing website)  
16 infringed on Liberty's copyrighted works. *Tr.* at 384:2-6. Oron was initially represented by  
17 Stevan Lieberman ("Lieberman"). *Id.* at 384:7-9. In June 2012, the parties participated in  
18 settlement negotiations which resulted in a Lieberman sending Randazza an agreement  
19 that Randazza subsequently executed on behalf of Liberty. *Id.* at 384:12-22; Exhibit 345.  
20 Under the agreement, Oron was to pay Liberty \$550,000 in exchange for the dismissal of  
21 Liberty's lawsuit. *Id.* Part of the agreement also required Liberty to dissuade others from  
22 bringing suit against Oron in the future. *Tr.* at 385:15-20.

23 Oron subsequently claimed that the agreement was not binding. *Id.* at 388:3-5.  
24 Accordingly, Randazza filed a motion to enforce the settlement that was granted on August  
25 7, 2012 by Judge Gloria Navarro of the U.S. District Court for the District of Nevada. *Id.* at  
26 388:6-10; Exhibit 91. Randazza also filed a motion for attorneys' fees. After the court  
27 granted the motion to enforce the settlement, Randazza and Lieberman recommenced  
28 settlement negotiations. On August 7, 2012 Randazza sent an email to Lieberman offering



1 to resolve the Oron matter (including withdrawing the original motion for fees that remained  
 2 pending before the court) if Oron agreed to wire \$550,000.00 to his trust account within  
 3 twenty four hours. **Exhibit 377.** Randazza also made a proposition to Lieberman: "And, if  
 4 Oron would like someone to show them how not to get sued in the future and would like to  
 5 have some more of my play book, they are welcome to contact me directly, or through you.  
 6 I make a much better friend than an enemy."<sup>23</sup> *Id.*

7 Randazza continued negotiating with Lieberman and proposed that Oron pay to  
 8 Liberty \$650,000 and that the money be transferred to Liberty's local attorney's account in  
 9 Hong Kong. **Tr. at 392:21-393:25; Exhibit 366.** Randazza then proposed:

10 whatever you guy [sic] pay me to retain me would come from your paypal  
 11 account, and would have no real relevance to that. I spoke to my partner,  
 12 who was adamant that we should earn \$100k if we're never to be able to sue  
 13 [Oron] forever and ever. I got him to go with \$75k. But, for that, we'll provide  
 14 some really great value—including a jurisdiction derailing plan that you'll drool  
 15 over.

16 **Exhibit 366.** By referencing the "jurisdictional derailing plan" Randazza was referring to a  
 17 plan that would make it more difficult for companies like Liberty to obtain jurisdiction in the  
 18 US over Oron in the future (to Liberty's detriment). **Tr. at 396:2-8.** Four minutes later,  
 19 while still negotiating a final resolution of the Oron matter for Liberty, Randazza emailed a  
 20 fee agreement to Lieberman to memorialize his future retention by Oron. **Exhibit 367.** The  
 21 agreement required Oron to pay Randazza a \$75,000 non-refundable retainer which  
 22 entitled Oron to advice for a period of thirty days. **Exhibit 367; Tr. at 398:10-400:17.**  
 23 Notably, Randazza made a point to send the retainer agreement to Oron before the  
 24 settlement agreement is signed so as to avoid being left hanging like he was after the  
 25 TNAFLix matter settled.

26 Sometime in early August, Gurvits (the same opposing counsel in the TNAFLix case)  
 27 took over as Oron's lead negotiator in this potential settlement. **Tr. at 404:25-405:16.** On  
 28 August 9, 2012, Gurvits sent Randazza a draft settlement agreement which provided for

<sup>23</sup> Randazza claims this was not the first time the topic of potentially assisting Oron was raised, but he acknowledges that he is not aware of any documentation prior to that email which shows that Oron initiated the discussion. **Tr. at 390:20-391:9.**



1 Oron to pay Liberty Media \$600,000, and \$75,000 to be paid to Randazza (along with other  
 2 bonuses) after the full amount is transferred from Oron to Gurvits' trust account. **Exhibit**  
 3 **405; Tr. at 405:2-408:16.** This specific draft also made Randazza's engagement  
 4 agreement an attachment to the settlement agreement. **Exhibit 405 at MJR 020236.**  
 5 When faced with the prospect of having his unethical negotiations and consummation of his  
 6 agreement to restrict his practice being incorporated into the written settlement agreement,  
 7 Randazza attempted to cover his tracks by stating he had consulted with ethics counsel  
 8 and asked to modify a portion of Gurvits' proposed settlement agreement because he didn't  
 9 feel he could ethically enter into an agreement that restricts his right to practice. **Exhibit**  
 10 **406.** The truth of the matter is that Randazza had known since at least his handling of the  
 11 TNAFlix matter that his negotiations to restrict his practice were unethical. **See Exhibit 357.**

12 As was the case in the TNAFlix matter, with a wink and a nod, Randazza attempts to  
 13 sidestep his ethical transgressions to further his own personal interests of receiving the  
 14 bribe payment by assuring Oron's counsel he was sufficiently motivated by the prospect of  
 15 receiving the \$75,000 bribe after the settlement --- "[t]hat is a hell of a lot of money, so they  
 16 can probably consider my possible incentives and act accordingly." **Exhibit 406.** Gurvits  
 17 responded by stating "Understood. I will take care of it in a way that addresses your  
 18 concerns. *Id.* Then, on August 10, 2012, Randazza proposed an alternative way for him to  
 19 get the \$75,000—by saying it was a settlement with him personally. **Exhibit 368.** There is  
 20 no evidence Randazza actually had a claim against Oron and he admitted during the  
 21 hearing that he has no communications which evidence he ever asserted to Oron that he  
 22 had any personal claims against them. **Tr. at 416:19-417:2.** It is evident that this was just  
 23 another attempt to hide the fact that Randazza was negotiating a bribe to restrict his right to  
 24 practice.

25 On August 10, 2012, Randazza filed a renewed motion for fees on behalf of  
 26 Liberty.<sup>24</sup> **Tr. at 388:11-14; Exhibit 92.** On August 12, 2012, Gurvits sent a revised  
 27

28 <sup>24</sup> Although it was never collected, the motion for fees was eventually granted by Judge Navarro awarding \$131,797.50 in fees on September 4, 2012. **Exhibit 93.**

1 version of the settlement agreement to Randazza which proposed that Liberty would be paid  
 2 \$600,000 and an additional \$75,000 would be held by Gurvits. **Exhibit 407 (MJR020326);**  
 3 **Tr. at 417:3-418:21.** Gone from this version of the settlement agreement is any reference  
 4 to the \$75,000 being paid to Randazza, however the email correspondence between  
 5 Gurvits and Randazza clearly envisions that the money would be paid to Randazza if he  
 6 agreed "to assist Oron after Liberty is paid and the Liberty cases are dismissed." **Exhibit**  
 7 **407 (MJR020321)(August 12, 12:04 p.m. email); Tr. at 418:8-21.**

8 On August 13, 2012, Randazza presented a draft of the proposed settlement  
 9 agreement to Gibson for his review. **Tr. at 424:7-425:9, 701:15-702:10.** Upon review,  
 10 Gibson questioned why the \$75,000 was being set aside for Gurvits and who the money  
 11 would be going to. **Id. at 425:14-16; 701:21-702:10.** Randazza then, for the first time,  
 12 informed Gibson that the money was a "bribe" from Oron in order to keep him from suing  
 13 Oron in the future. **Id. at 701:21-702:24, 703:1-704:24.** Upon hearing this, Gibson  
 14 demanded that Liberty receive the money and not Randazza. **Tr. at 428:11-19; see also**  
 15 **Exhibit 324.** Randazza informed Gibson that he had an ethical problem as a result of his  
 16 demand because giving Liberty the money would result in illegal fee sharing. **Tr. at**  
 17 **428:11-19** Because he knew Gibson was "chafing" over the \$75,000 "bribe," on August  
 18 16, 2012 Randazza sent an email to Gibson attempting to explain it.<sup>25</sup> **Exhibit 327.** He  
 19 first indicated that the money was not being taken from Liberty because Oron was only  
 20 willing to pay \$600,000 anyway. **Id.** He also represented that he had disclosed the  
 21 payment to Gibson "even before it happened."<sup>26</sup> **Id.** Finally, he told Gibson that it would be  
 22 improper fee sharing if he gave the money to Liberty but he was willing to step over that  
 23 line for him. **Id.** Gibson denies having any knowledge that Randazza was actively  
 24 negotiating a payment to his firm throughout the course of the Oron litigation. **Tr. at**

25 <sup>25</sup> Randazza's email acknowledged that Gibson had not spoken to him since August 13, 2012 (the  
 26 day the \$75,000 payment was first revealed to the Company). **See Exhibit 327.** Additionally, the  
 27 evidence shows a clear shift in the nature of the relationship between Gibson and Randazza once  
 the bribe was discovered. **Tr. at 446:7-449:14.**

28 <sup>26</sup> This is clearly not true given that Randazza admitted during the hearing that he never disclosed  
 an amount to Gibson. **Tr. at 429:16-22.**

1 701:17-701:20, 702:14-702:24. He also denies consenting to such negotiations. *Id.* at  
2 704:25-705:3, 705:23-706:16.

3 *ii. James Grady*

4 Prior to filing the Oron lawsuit, Randazza solicited other adult content producers to  
5 potentially join the lawsuit in order to minimize the costs to Liberty. A man named James  
6 Grady was interested in pursuing Oron and, unbeknownst to Liberty, agreed to contribute  
7 \$5,000 and to assist in gathering facts in support of Liberty's claims.<sup>27</sup> *Tr. at 594:12-21;*  
8 **Exhibit 396.** On June 6, 2012, Randazza emailed Grady inquiring about information  
9 regarding Maxim Bochenko ("Bochenko"), who was the owner of Oron. **Exhibit 396.**  
10 Grady responded by providing some personal information about Bochenko. *Id.* Grady  
11 stated in his June 6, 2012 email that he "pay[s] a guy—call him a forensic investigator—to  
12 dig past Domains by Proxy and things like that." *Id.* With regard to the information he was  
13 providing about Oron, Grady told Randazza that the forensic investigator "didn't get the info  
14 at Walmart in the course of normal commerce." *Id.* Despite the clear implications of Grady's  
15 comments, Randazza continued to solicit information from Grady regarding Oron. *See*  
16 **Exhibit 397.** Grady provided Randazza with access to privileged emails Oron exchanged  
17 with Lieberman, Oron's financial and business records, information about emails sent and  
18 received from Oron's email accounts, and Bochenko's personal email account and Skype  
19 phone logs. *Tr. at 594:22-595:16; Exhibit 397.*

20 With knowledge the information was gathered by a "forensic investigator", Randazza  
21 asked Grady to assemble the documentation and have it sent in an anonymous package to  
22 Liberty/Excelsior. *Tr. at 595:17-21.* Randazza later submitted some of the information  
23 Grady provided him to the court. *Id. at 595:22-596:1.* Randazza also asked for Grady to  
24 come to Las Vegas to be a "star witness" in the case by testifying about the information he  
25 knows about Oron. **Exhibit 399.** Randazza coached Grady about the correct manner in  
26 which he should respond if asked where the information came from:

27  
28 <sup>27</sup> Randazza never gave Excelsior the \$5,000 Grady contributed.

1 As far as I know it was lawfully obtained. You certainly got it lawfully. If the  
2 source is a disgruntled Oron employee, great. Jilted lover, great. Hacker,  
3 problematic.

4 *Id.*; **Tr. at 602:1-12.** Gibson was aware that an anonymous package was delivered to the  
5 company from an anonymous source containing confidential documents related to Oron.  
6 **Tr. at 748:17-20.** When Gibson asked Randazza where the documents came from  
7 Randazza's only response was: "don't ask." *Id. at 748:21-749:3.* Oron subsequently  
8 accused Liberty of utilizing a hacker to steal confidential information from the company in a  
9 demand for arbitration filed against the Company. *Id. at 749:4-12.*

10 *iii. \$25,000 Note*

11 The Oron litigation involved a strategic lawsuit being filed in Hong Kong against  
12 Oron so that an injunction could be obtained to freeze Oron's various bank accounts  
13 outside of the United States. **Tr. at 720:19-722:4.** Seeking the injunction necessitated that  
14 Liberty retain counsel in Hong Kong. *Id.* In order to do so, it would cost \$50,000 in fees to  
15 Hong Kong counsel. *Id.* Gibson and Brian Lowderman were growing weary of the ever-  
16 increasing fees in the Oron case so they asked if Randazza was confident that this was the  
17 correct strategy. *Id. at 722:6-723:10.* When Randazza said he was, Gibson asked if  
18 Randazza would chip in half of the "investment" given how confident he was. *Id.*  
19 Randazza agreed to loan the company the \$25,000 and subsequently prepared a note  
20 reflecting the transaction. *Id.*; **Exhibit 373.** Gibson signed the note and gave it back to  
21 Randazza. **Exhibit 373.** The promissory note refers to the transaction as a loan and  
22 characterizes Randazza as the lender and Liberty as the borrower. *Id.* The note also  
23 includes a unilateral attorneys' fee provision for collection on the note. *Id.*

24 Contrary to Randazza's allegations, no one at the Company ever stated or implied  
25 that Randazza would be terminated if he didn't contribute the \$25,000 to the optional  
26 pursuit of the injunction. **Tr. at 723:11-20.** Randazza prepared the note but gave no verbal  
27 or written explanation of what his role as a lender meant, nor did he encourage Gibson to  
28 consult with separate counsel prior to executing the agreement. *Id. at 723:21-724:12.*

1 **iv. Violation of Settlement Agreement**

2 As discussed previously, Randazza signed the Oron settlement agreement on behalf  
3 of Liberty on July 1, 2012. Randazza then moved to enforce the agreement after Oron took  
4 the position that the agreement was not binding. One of the provision of the agreement  
5 required Liberty to "dissuade others from bringing suit against Oron." After the settlement  
6 agreement had been enforced in the U.S. District Court for the District of Nevada,  
7 Randazza provided another attorney, Gill Sperlein, with information about the Oron matter,  
8 including pleadings and motions, and Oron account information. **Exhibit 346; Tr. at**  
9 **589:20-591:10.** On August 29, 2012, Randazza wrote an email to his paralegal (Dillon) in  
10 which he discussed filing a "half-hearted Motion to Stay" in federal court in order to "mask  
11 that we are not helping Gill." **Exhibit 349; Tr. at 592:22-593:21.** He also informed Dillon  
12 that they should help Sperlein anymore until the appeal deadline passes. *Id.*

13 Randazza testified that he fully informed Gibson that assisting Sperlein would  
14 breach the settlement agreement with Oron. However, Randazza admits that there is no  
15 documentation which shows he provided adequate disclosure to Gibson of what he was  
16 assisting Sperlein with and that it would be considered a breach of the settlement  
17 agreement. **Tr. at 584:17-588:21.** Gibson denies that Randazza ever provided him with  
18 notice that he was breaching the agreement, or consent to allow Randazza to breach the  
19 agreement. *Id.* **at 746:15-748:4.** Oron appealed Judge Navarro's order enforcing the July  
20 1, 2012 settlement agreement with Liberty. **Tr. at 583:16-20.** Oron also subsequently filed  
21 a demand for arbitration against Liberty in which they claimed that Liberty breached the  
22 settlement agreement by assisting Sperlein in suing Oron on behalf of another company.  
23 **Tr. at 583:21-584:8; Exhibit 334.**

24 **v. Simultaneous Representation of Porn Guardian**

25 Another conflict arose when, unbeknownst to Liberty, Randazza was representing  
26 Porn Guardian in a dispute it had with Oron during the same time period Randazza was  
27 representing Liberty. **Tr. at 283:24-285:13.** In fact, the evidence indicates that Randazza  
28 was actively negotiating settlements for both companies during that time period. *Id.* **at**



1 384:12-388:2, 559:17-567:4. During portions of the negotiations Oron even proposed that  
 2 the two settlements be tied together. *Id.* Randazza eventually did stop negotiating on Porn  
 3 Guardian's behalf because he realized how blatant his conflict was. However, he never  
 4 once advised the company that he was concurrently representing Porn Guardian during  
 5 that period or that Porn Guardian stood to gain in a potential settlement. *Id.* at 743:12-  
 6 744:4. In fact, Randazza failed to even disclose to Gibson that the Oron settlement  
 7 agreement was contingent upon Porn Guardian also settling with Oron.

8 **vi. *Randazza Committed Malpractice and Breached His***  
 9 ***Fiduciary Duty During the Course of the Oron Matter***

10 Randazza breached his fiduciary duty and his conduct fell below the standard of  
 11 care by negotiating a payment with Oron during the settlement of the Oron matter, utilizing  
 12 information obtained from James Grady when it clearly arose from an unlawful or unethical  
 13 source, entering into a transaction with Liberty in the form of the \$25,000 note, violating the  
 14 settlement agreement with Oron by providing information to Sperlein in order to assist him  
 15 in a suit against Oron, and simultaneously representing Porn Guardian and Liberty in  
 16 settlement negotiations with Oron. **Exhibit 304, Kennedy's Report at ¶¶ 25-32.12.**

17 The Oron litigation occurred in Nevada and implicates various violations of the  
 18 Nevada Rules of Professional Conduct ("Nev. RPC"). Nevada attorneys have a duty to  
 19 communicate with a client regarding substantive matters requiring the clients informed  
 20 consent, reasonable consulting with the client about the means to accomplish the client's  
 21 objectives, keep the client abreast of the status of the matter, and explaining matters to the  
 22 client as is reasonably necessary to permit the client to make informed decisions. Nev.  
 23 RPC 1.4(a)-(b). Nev. RPC 1.7 (a)(2) provides that a lawyer shall not represent a client if  
 24 "[t]here is a significant risk that the representation of one of more clients will be materially  
 25 limited by the lawyer's responsibilities to another client, a former client, or a third person or  
 26 by a personal interest of the lawyer." Notwithstanding the existence of a concurrent  
 27 conflict of interest an attorney may represent a client if the lawyer reasonably believes that  
 28 he can competently and diligently represent the client, the representation is not prohibited

by law, the representation does not involved assertion of a claim by one client against the other in the same matter, and each affected client "gives informed consent, confirmed in writing." Nev. RPC 1.7(b).

Like California attorneys, Nevada attorneys are also prohibited from restricting their right to practice. Nev. RPC 5.6(b) provides that an attorney shall not "participate in offering or making" an agreement "in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." Nevada lawyers also have restrictions on business transactions they can enter into with their clients. A lawyer may not enter into a business transaction with a client unless:

- (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Nev. RPC 1.8(a).

When representing a client, a lawyer "shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person." Nev. RPC 4.4(a). Along similar lines, a lawyer "who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Nev. 4.4(b). In *Merits Incentives, LLC v. Eighth Judicial District Court*, 262 P.3d 720, 725 (2011), the Nevada Supreme Court discussed Rule 4.4(a) and its proscription against lawyers taking a part in "obtaining an opposing party's documents" through wrongful means or being "complicit in actions used to wrongfully obtain those documents."

With respect to the conflict of interest which arose from his negotiations, Randazza should not have been discussing the prospect of receiving a payment directly from Oron through settlement of the Oron Matter because he "risked diverting money away from his

1 client (Liberty) to himself." **Exhibit 304, Kennedy's Report at ¶ 32.1.** The prospect of  
 2 earning a non-refundable, earned-upon receive retainer for \$75,000 "blinded Mr. Randazza  
 3 to his fiduciary obligation—negotiating a settlement exclusively for and on behalf of  
 4 Liberty—and created a personal conflict of interest under Nevada RPC 1.7(a)(2) for which  
 5 he did not obtain informed consent, confirmed in writing, from Liberty as required." *Id.* at ¶  
 6 **32.3.**

7 Randazza's legal ethics expert, Joseph Garin, concludes that Randazza does not  
 8 have a personal interest that must be discussed under Nev. RPC 1.7, however his opinion  
 9 is based on his acceptance of Randazza's version of the events (that Randazza was  
 10 bluffing and had no expectation of receiving the bribes). **Tr. at 1219:20-1221:24.** As if  
 11 Randazza's overall lack of credibility has not already been established, two specific facts  
 12 are worth mentioning with respect to Randazza's negotiation of this and the other bribes.  
 13 Randazza originally testified that to his recollection, the conversation he had with his  
 14 partner Ron Green about the potential \$75,000 payment referenced in **Exhibit 366** actually  
 15 occurred. **Tr. at 395:7-395:17.** However, during Green's deposition Green denied that the  
 16 two ever had such a conversation. *Id.* at **395:18-21.** Additionally, while Randazza claims  
 17 (and his experts accept as true) that it was common in intellectual property litigation to be  
 18 approached with a "bribe" as part of settlement negotiations, Randazza's own partner  
 19 testified that it is not common and that he has never been approached for such an  
 20 arrangement. *Id.* at **656:14-657:13.** Mr. Garin admitted during his testimony that if the  
 21 Arbitrator were to accept the premise that Randazza actually intended or expected to  
 22 receive the money he was negotiating for, then a personal interest did exist. *Id.* at  
 23 **1221:11-24.** As discussed herein, Randazza's attempted justification of his improper  
 24 conduct in negotiating bribes has been shown to not be credible.<sup>28</sup> If the Arbitrator accepts

25  
 26 <sup>28</sup> This includes the fact that in the TNAflix litigation Randazza sent the retention agreement after  
 27 the settlement was completed but it was ultimately not completed and then in the Oron case  
 28 Randazza attempted to avoid a similar result by sending the agreement prior to settlement.  
 Additionally, when Randazza was confronted by Gibson about the money he told Gibson it was a  
 bribe for Randazza Legal Group.

1 the premise that Randazza intended or hoped to receive the \$75,000 dollars then an  
2 obligation arose to seek informed consent from Excelsior.<sup>29</sup>

3 As has been discussed previously, Randazza likewise never should have been  
4 engaging in negotiations to restrict his right to practice. Randazza violated Nev. RPC 5.6  
5 when he participated in negotiations and activity encouraged Oron to hire him. **Exhibit**  
6 **304, Kennedy's Report at ¶ 32.2.** Randazza knew that Rule 5.6 "prohibited him from  
7 directly or indirectly negotiating to conflict himself out of future cases against Oron  
8 (admitting that it 'creates an ethical gray area' for him). He should have flatly rejected the  
9 suggestion when it was raised." *Id.* Instead, he told opposing counsel that he should earn  
10 "\$100k if we're never to be able to sue [Oron] forever and ever." **See Exhibit 366.**  
11 Randazza's expert, Ms. Peck, testified that such an offer would fit into even her narrow  
12 view of what restricting ones right to practice would be:

13 Q: Would another example of [offering to restrict your right to practice],  
14 the unlawful type of restriction, be somebody saying something like, I  
15 should get \$75,000 if I'm never going to sue you again forever and  
16 ever?

17 A: I think that that could be within it. I think you would somehow—well, it  
18 could—it's arguably over the line.

19 **Tr. at 1306:1-7.** At the hearing, Randazza's other expert, Mr. Garin, backed away from his  
20 expert report and admitted that Randazza committed what he characterized as a "technical  
21 violation" of Nev. RPC 5.6 (even while assuming Randazza's "negotiation strategy" defense  
22 is true). **Tr. at 1129:8-1130:4.** Nonetheless, he maintained that no malpractice occurred  
23 with respect to this issue based upon a tortured assumption that Gibson knew about the  
24 alleged bribes and was actually encouraging that conduct because of a direction he  
25 allegedly gave to Randazza to maximize the result for Liberty as efficiently and quickly as  
26 he saw fit. *Id.* **at 1195:21-1197:1.** To assume that such a generic direction (if it even  
27 occurred) authorized Randazza to engage in this unethical behavior is a stretch, at best.

28 Randazza also violated Nev. RPC 4.4(a) and 4.4(b) by using the information

<sup>29</sup> Mr. Garin also admitted that he cannot say for certain that the Oron settlement amount would not have been different if Randazza was not negotiating a \$75,000 bribe for himself. **Tr. at 1201:7-11.**

provided to him by James Grady—when he either knew, or should have known that the information had been illegally or unethically obtained. *Id.* at 1025:5-1030:2.

This, above all things I looked at, is the most serious, in my view. It is pretty obvious that Mr. Grady's source was hacking the opposing party's e-mails and records. I mean, there's—there's a lot of code words and things like that that are used, but it's pretty apparent and would be apparent to any lawyer who received this information that the information that was being received including communications between the opposing party and the opposing party's lawyer, and the opposing party's bank records and PayPal records. So to ask someone to get that information for you, and then say to them, Send it, in essence, anonymously to the following address, and then it's received, and it is then used, that is as serious a violation of the Rules of Professional Conduct as there is.

*Id.* at 1025:17-1026:9. Randazza's expert tellingly provided no opinion as to whether Randazza violated NRPC 4.4(a) during his direct examination. *Tr.* at 1189:5-8. However, Mr. Garin did admit that if Randazza knew that the Oron information was unlawfully gathered it would be a violation of Nev. RPC 4.4(a). *Id.* at 1211:24-1212:2.

With regard to the \$25,000 loan Randazza gave to the Company, he should have made the requisite disclosures to Liberty prior to presenting the \$25,000 note to Liberty. Specifically, Liberty should have been advised in writing to seek separate counsel in such a transaction and Randazza should have given them a reasonable opportunity to do so. *Id.* at 1023:20-1025:3. Liberty should have been told to consult with independent counsel about the terms of the promissory note—especially the unilateral attorneys' fee provision and clause requiring repayment upon seven (7) days of Randazza's termination.<sup>30</sup> **Exhibit 304, Kennedy's Report at ¶ 32.9.2.** Randazza also should have explained the advantages and disadvantages of the loan and reasonably available alternatives. *See In re Discipline of Singer*, 109 Nev. 1117, 1120 (Nev. 1993). It is undisputed that this did not occur. Accordingly, Randazza violated Nev. RPC 1.8 by entering into the agreement with his client.

As for his role in breaching the settlement agreement, in assisting Sperlein by providing the Oron information Randazza's conduct constituted a material change in

<sup>30</sup> Even Randazza's own expert admitted that including an attorneys' fee provision in the note raised a "yellow light" in his analysis. *Tr.* at 1140:4-14.



1 circumstances which required him to obtain client approval prior to acting. **Tr. at 1030:15-**  
 2 **1032:16.** Only the client could authorize the attorney to violate a settlement agreement  
 3 pursuant to Nev. RPC 1.2. *Id.* Even Randazza's own expert, who has a different opinion  
 4 than Kennedy on this matter, admitted during the hearing that he does not know what  
 5 Randazza shared with Sperlein. **Tr. at 1180:18-1183:10.** He also admitted that Randazza  
 6 and his counsel never informed him that Randazza had provided Sperlein with a list of  
 7 known bank accounts and his entire legal file on Oron. *Id.* at 1183:2-11. As Mr. Garin  
 8 himself admitted, Randazza's lack of candor and truthfulness with him could alter his  
 9 conclusions. *Id.* at 1164:4-12. Given that Randazza never made adequate disclosure of  
 10 his intentions and the potential consequences for Excelsior to make an informed decision,  
 11 Randazza breached his fiduciary duty and committed malpractice in assisting Sperlein to  
 12 bring suit against Oron.

13 Finally, Randazza's concurrent representation of Porn Guardian and Liberty in  
 14 settlement negotiations with Oron was a violation of Nev. RPC 1.7. **Exhibit 304,**  
 15 **Kennedy's Report at ¶¶ 37.10-37.12.** Randazza's expert argues that there was never a  
 16 reportable conflict which arose because Randazza informed Porn Guardian that he could  
 17 no longer represent them.<sup>31</sup> Kennedy's Report explains the problem with this theory:

18 By negotiating a settlement for Porn Guardian with Oron's counsel, Mr.  
 19 Randazza potentially diverted settlement funds away from Liberty ... Mr.  
 20 Randazza recognized during settlement negotiations that he had a conflict of  
 21 interest, and withdrew from continuing to represent Porn Guardian. However,  
 22 by that point, he had already reached a settlement in principle with Oron and  
 23 those parties simply needed to execute the settlement agreement. Mr.  
 24 Randazza could not sidestep the conflict by having Porn Guardian represent  
 25 itself at the eleventh hour. Mr. Randazza needed Liberty to provide informed  
 26 consent, confirmed in writing, to the work that he had done and was  
 27 simultaneously doing for Porn Guardian.

28 As a matter of fact, it wasn't even the eleventh hour when Randazza actually resigned from  
 representing Porn Guardian. Randazza sent his resignation email to Porn Guardian on  
 July 5, 2012. **Exhibit 404.** That is five days after Randazza executed the original

<sup>31</sup> Ms. Peck's opinion on this matter is meritless given that she admittedly analyzed this potential conflict under California law even though the conflict arose in Nevada.

1 settlement agreement on Excelsior's behalf. **See Exhibits 90 and 345.** In light of these  
 2 facts, Randazza undoubtedly breached his fiduciary duty and committed malpractice during  
 3 the course of the Oron litigation.

4 **d. XVideos/XNXX**

5 Randazza's representation of XVideos and XNXX, two known copyright infringers,  
 6 during the time period in which he was employed by and represented Excelsior/Liberty  
 7 created an undeniable conflict of interest. Despite repeated knowledge that Liberty's  
 8 copyrighted material was being found on these sites and explicit pleas for Randazza to take  
 9 legal action against them, Randazza ignored, and at times actively dissuaded Liberty from  
 10 taking action without ever revealing that XVideos and XNXX were his clients. In so doing,  
 11 Randazza breached his fiduciary duty and committed malpractice.

12 During Randazza's employment with Excelsior, he was retained by an entity which  
 13 owns and operates two pornographic sites entitled XVideos and XNXX. **Exhibit 420**  
 14 **(showing XVideos and XNXX became Randazza's client in June 2010).** It was common  
 15 throughout Randazza's employment for Liberty's copyrighted films to be found on the  
 16 XVideos site and for Randazza to be informed about it. **See e.g. Exhibit 389; Exhibit 410;**  
 17 **Tr. at 503:22-23, 519:10-520:15, 520:18-525:7, 733:6-24.** XNXX, like XVideos, is another  
 18 site in which Liberty's copyrighted material was often found. **See e.g. Exhibit 422, Tr. at**  
 19 **502:4-503:21, 511:4-517:16, 729:11-730:2.** In January 2010 (prior to representing  
 20 XVideos and XNXX), Randazza himself proposed to Gibson that the company contemplate  
 21 suing both sites. **See Exhibit 316; Tr. at 507:20-508:3.** In January 2011, after  
 22 Randazza's representation of XVideos and XNXX began, Liberty approached Randazza  
 23 about suing XVideos for copyright infringement. **Exhibit 410 (EMC 004583); Exhibit 378.**  
 24 In response to Excelsior, Randazza indicated that he and another attorney at his firm had  
 25 previously forced XVideos to implement a system for detecting unauthorized uploads of  
 26 copyrighted works onto its website, which he represented would present a strong defense  
 27 to an infringement lawsuit. **Exhibit 378; Tr. at 525:13-526:1, 527:15-529:22.**

28 In September 2011, Liberty once again broached the topic of suing XVideos for

1 copyright infringement because of the continued copyrighted works found on its site.  
 2 **Exhibit 390; Tr. at 734:10-24.** Randazza advised Liberty against the proposed course of  
 3 action, claiming that XVideos' use of the content at issue was "fair use," and thus, protected  
 4 under federal law. **Exhibit 390; Tr. at 734:21-735:14.** He also indicated that it would look  
 5 bad from a publicity standpoint to bring a claim against XVideos. **Exhibit 390.**

6 Randazza never disclosed that he represented XVideos and did not obtain informed  
 7 consent, confirmed in writing, from Liberty to continue representing XVideos once it  
 8 became apparent that his representation of Liberty could be materially limited by his  
 9 concurrent representation of XVideos. **Tr. at 508:4-15, 735:15-736:9, 847:11-13, 875:23-**  
 10 **25.** Randazza also never disclosed the fact that he represented XNXX—even after Gibson  
 11 explicitly requested that Randazza sue XNXX. **Tr. at 509:3-8, 516:14-517:16, 730:3-12,**  
 12 **876:1-3, 847:14-16; Exhibit 422.** The Company never provided informed consent to  
 13 Randazza that would have allowed him to continue his representation XNXX. **Tr. at**  
 14 **508:23-509:2, 730:3-12.**

15 In light of these facts, Randazza undoubtedly had a conflict of interest in advising  
 16 Liberty not to pursue a copyright infringement action against XVideos based on his existing  
 17 professional relationship with XVideos and XNXX. **Exhibit 304, Kennedy's Report at ¶¶**  
 18 **35-37, 37.5-37.7; Tr. at 1032:17-1035:14, 1037:15-1040:60.** Cal. RPC 3-310(c)(2) states  
 19 that a lawyer shall not, without informed written consent of each client "[a]ccept or continue  
 20 representation of more than one client in a matter in which the interests of the clients  
 21 actually conflict." Nevada has a similar rule: "a lawyer shall not represent a client if the  
 22 representation involves a concurrent conflict of interest. A concurrent conflict of interest  
 23 exists if ... [t]here is a significant risk that the representation of one or more clients will be  
 24 materially limited by the lawyer's responsibilities to another client." Nev. RPC 1.7(a)(2).  
 25 Notwithstanding the existence of a concurrent conflict of interest a lawyer may represent a  
 26 client if the lawyer reasonably believes that the lawyer will be able to provide competent  
 27 and diligent representation to both parties and the representation does not involve the  
 28 assertion of a claim by one client against another client represented by the lawyer in the

1 same matter, and each client gives informed consent, confirmed in writing. Nev. RPC  
2 1.7(b).

3 By way of reminder, Randazza initially represented to the State Bar that he  
4 represented XVideos in resolving one specific matter and, "after that, Randazza did not do  
5 any work for XVideos." **Exhibit 372 at EMC001610.** Randazza further reported this same  
6 misrepresentation to both of his own ethics experts. **Tr. at 1173:5-13, 1320:9-20.** At  
7 arbitration, Randazza was forced to acknowledge his misrepresentation and admit that  
8 after the one specific matter he handled for XVideos, rather than ceasing to do further work  
9 for them, he continued to represent XVideos throughout the remainder of his employment  
10 with Excelsior. **Tr. at 538:8-541:22 and Exhibit 313 at p. 4.** Randazza's own ethics  
11 expert admitted that Randazza's representation to the bar that XVideos was no longer a  
12 client could be considered a false statement of material fact. **Tr. at 1176:9-20.**

13 Randazza should have refrained from advising Liberty on the merits of a copyright  
14 infringement action against XVideos based upon his concurrent representation of the site.  
15 **Exhibit 304, Kennedy's Report at ¶ 37.5.** When asked to sue XVideos and XNXX  
16 Randazza was put between a rock and a hard place because it involved a potential claim  
17 by one of his clients against his other client. In other words, such a conflict was not  
18 consentable, Randazza should have disclosed the representation to Liberty and Randazza  
19 and he should have encouraged them to seek separate counsel. **Id. at ¶¶ 37.6 – 37.7; Tr.**  
20 **at 1038:17-1040:6.** Randazza's own expert admitted on direct examination by Randazza's  
21 counsel that "when they ask you to sue, boom, you are in conflict land." **Tr. at 1157:25-**  
22 **1158:13.** He later admitted on cross examination that Randazza should have disclosed his  
23 representation of XVideos in light of the request to sue (the same could be said for XNXX  
24 upon Gibson's request to sue that site).

25 Q: Now, given that Mr. Randazza was representing at this time both  
26 XVideos and Liberty, should he have provided Liberty with full  
27 disclosure that he was XVideos' attorney?

A: Assuming that to be the case, yes.

27 ...

28 Q: On XVideos you gave some testimony that when someone is asked—if

1 when you are asked to sue someone and there is potential conflict of  
2 interest, boom, you are in conflict land; do you recall what I'm talking  
about?

3 A: Yes, I recall that, yes.

4 Q: So in the circumstance where Mr. Randazza represents XVideos and  
my client asks him to sue XVideos, unless my client then immediately  
withdrew the request to sue XVideos, Marc should have disclosed that  
he represented XVideos; is that a fair statement?

5 A: Yeah, I would say that is fair.

6 **Tr. at 1180:3-11, 1211:1-13.**

7 Randazza's other expert, Ms. Peck, admitted during the hearing that at the time of  
8 her report she was also under the misimpression, created by Mr. Randazza, that by 2011  
9 he was no longer representing XVideos. **Tr. at 1317:3-14; 1320:9-1321:18.** Ms. Peck also  
10 confirmed that an attorney has to be truthful when disclosing a conflict of interest to his or  
11 her client. **Id. at 1323:6-12.** Ms. Peck then attempted, albeit unpersuasively, to claim that  
12 Randazza had disclosed his representation of XVideos by relying upon the email Randazza  
13 sent where he represents that he shoved Vobile down XVideos' throat "for the free speech  
14 coalition." **Exhibit 378.** Nowhere in that document does Randazza provide actual  
15 disclosure that he was concurrently representing XVideos—at most it implies that he was  
16 acting in the interest of an adult industry interest group and was another evasive response  
17 to avoid revealing his representation of XVideos. **See id.** Accordingly, Randazza clearly  
18 was not truthful with Liberty in his disclosure of the conflict. When pressed on that issue  
19 Ms. Peck then attempted to cast the email as Randazza declining to represent Liberty in its  
20 pursuit against XVideos in order to avoid the conflict.<sup>32</sup> **Tr. 1323:13-1327:18.** She then  
21 was forced to admit that **Exhibit 378** would not be enough disclosure to Excelsior of the  
22 conflict. **Id. at 1326:5-1327:18.**

23 Finally, Randazza testified that he saw no need to seek informed consent because  
24 he did not believe a valid claim existed against XVideos or XNXX. Randazza also tried to  
25 imply that Liberty/Excelsior was aware of his representation because he would brag about  
26

27 <sup>32</sup> The problem with this point is that Randazza was not outside counsel. His primary responsibility  
28 was to litigate on Liberty's behalf. It's illogical to conclude that he was declining to accept the  
company as a client in a specific case as if he was operating as outside counsel.



1 being able to get these sites to take content down when he requested. Both of these  
 2 arguments are meritless. First, Randazza himself defended XVideos and XNXX against  
 3 copyright infringement claims made by other pornographic content producers which  
 4 resulted in XNXX and XVideos paying over \$100,000 to settle those claims. **Tr. at 507:20-**  
 5 **511:1.** If content producers had no valid claims against sites like XNXX and XVideos there  
 6 would have been no need for Randazza to represent them in such disputes. *Id.* Second,  
 7 Kennedy's testimony made clear that simply bragging about relationships comes nowhere  
 8 near what is required in order to adequately disclose a conflict of interest. **Tr. at 1034:19-**  
 9 **1035:14.** In light of these facts, Randazza committed malpractice by engaging in the dual  
 10 representation of these companies with interests that were materially adverse to one  
 11 another.

#### 12 e. Titan Media/Kink

13 In 2012 Randazza advised Excelsior/Liberty with respect to various producer  
 14 agreements they were entering into with adult production companies as part of a new  
 15 business venture. Unbeknownst to Liberty, two of the companies Liberty was entering into  
 16 agreements with happened to be Randazza's clients, Titan Media and Kink. Throughout  
 17 the course of those negotiations Randazza advised Liberty to accept concessions Titan  
 18 Media was requesting be made to the producer agreements. Even while faced with this  
 19 conflict, Randazza never revealed that he represented either Titan Media or Kink while  
 20 employed by the Company.

21 Randazza represented Titan Media and Kink.com during the time period in which he  
 22 was employed by Excelsior. **Tr. at 285:22-286:5, 579:2-16, 580:6-8; Exhibit 416.** During  
 23 the course of Randazza's employment with the Company, Liberty acquired the internet  
 24 domain "gay.xxx". **Tr. at 737:12-14, 876:13-16.** With Randazza's assistance, Liberty  
 25 entered into producer agreements with other adult entertainment producers to sell their  
 26 content on gay.xxx. *Id.* **at 876:13-878:17.** In 2012, both Titan Media and Kink entered into  
 27 producer agreements with Liberty for this purpose. *Id.* During the course of negotiating  
 28 the producer agreement with Titan Media, Randazza urged Liberty to make an exception

1 with respect to certain terms in the Titan Media agreement. *Id.* Randazza never disclosed  
 2 that he represented Titan Media and Kink in other matters and did not obtain informed  
 3 consent, confirmed in writing, to do so once it became apparent that his representation of  
 4 Liberty could be limited by his representation of Titan Media or Kink. **Tr. at 737:15-25,**  
 5 **847:17-22, 876:4-878:17.**

6 As noted previously, a concurrent conflict of interest exists if ... [t]here is a significant  
 7 risk that the representation of one or more clients will be materially limited by the lawyer's  
 8 responsibilities to another client, a former client or a third person or by a personal interest  
 9 of the lawyer." Nev. RPC 1.7(a)(2). Notwithstanding the existence of a concurrent conflict  
 10 of interest a lawyer may represent a client if the lawyer reasonably believes that the lawyer  
 11 will be able to provide competent and diligent representation to both parties and the  
 12 representation does not involve the assertion of a claim by one client against another client  
 13 represented by the lawyer in the same matter, and each client gives informed consent,  
 14 confirmed in writing. Nev. RPC 1.7(b).

15 Randazza was under the obligation to disclose his representation. **Exhibit 304,**  
 16 **Kennedy's Report at ¶¶ 35-37, 37.13.** Randazza's expert, Ms. Peck, disagreed with  
 17 Kennedy that any conflict existed—referring to them only as hypothetical conflicts. **Tr. at**  
 18 **1275:16-1276:1.** Unfortunately for Randazza, there is nothing hypothetical about the fact  
 19 that at a minimum Randazza advised the company with respect to significant concessions  
 20 Titan wanted in the producer agreements they entered into with the Company (which  
 21 Excelsior had not made for anyone else) but failed to disclose that he represented Titan  
 22 Media. *Id.* at **876:13-878:17.** Accordingly, Randazza should have obtained Liberty's  
 23 informed consent, confirmed in writing, to represent Titan Media and Kink while negotiating  
 24 the producer agreements for Liberty. His failure to do so violated Nev. RPC 1.7(a)(2) and  
 25 amounts to malpractice.<sup>33</sup> **Exhibit 304, Kennedy's Report at ¶¶ 35-37, 37.13; Tr. at**

26  
 27 <sup>33</sup> Randazza's other expert, Mr. Garin, admitted that when he authored his report on this topic he did  
 28 not know that Titan Media entered into producer agreements with the Company and that Randazza  
 gave advice to the company about changes Titan Media wanted made to the agreements. **Tr. at**  
**1209:11-1210:9.**

1 1043:19-1044:24.

2 f. Bang Bros/GRHK

3 Another way in which Randazza committed malpractice was through the conflicting  
4 representation of Bang Bros and GRHK during the time period in which he was employed  
5 as Excelsior's General Counsel. One of Randazza's long-time adult industry clients is  
6 Bang Bros. Tr. at 544:9-24. Randazza billed over \$20,000 to Bang Bros while he was  
7 representing Excelsior and Liberty. *Id.* at 545:8-546:7. In June 2012, Liberty was  
8 negotiating a potential acquisition of Cody Media, Inc. ("Cody Media"), a large adult  
9 entertainment producer. *Id.* at 550:21-24. Liberty intended to finance the purchase  
10 through a third-party lender. *Id.* at 550:25-551:2. During a meeting in which potential  
11 funding options were discussed, Randazza advised the Company to not seek funding from  
12 a potential source that had been identified (Ackrell Capital) and instead suggested that the  
13 Company obtain financing from Bang Bros. *Id.* at 551:3-25, 739:6-740:23, 871:9-874:1.  
14 Randazza failed to advise Liberty that he also represented Bang Bros and never obtained  
15 informed consent to continue representing both companies. *Id.* at 544:25-545:7, 847:7-10.  
16 Liberty ultimately did not proceed with the acquisition of Cody Media.

17 In August 2011, Randazza also represented Liberty in a dispute against an adult site  
18 entitled Fapzap. *Id.* at 554:25-557:17. Unbeknownst to Liberty, Randazza was  
19 simultaneously representing a company affiliated with Bang Bros entitled GRHK, LLC in a  
20 dispute against Fapzap. *Id.* at 553:14-557:17, 740:24-741:8. Randazza eventually settled  
21 the dispute on behalf of both parties. *Id.* at 557:15-558:3. Randazza recovered \$30,000  
22 for Liberty, and he recovered the Fapzap website for GRHK, LLC. *Id.* at 557:15-558:33.  
23 Randazza never disclosed to Liberty that GRHK was his client. *Id.* at 553:24-554:5,  
24 740:24-741:22. Randazza also never disclosed to Liberty that the site could potentially be  
25 acquired in the settlement. *See id.* at 740:24-741:22. Randazza's employment contract  
26 with Liberty afforded him 25% of the settlement proceeds of settlements he obtained on  
27 behalf of the company. *Id.* at 558:4-559:6. Had he obtained the site on Liberty's behalf, it  
28 would not have afforded him any bonus. *Id.* at 558:4-559:6.

Under Nevada law, a concurrent conflict of interest exists if ... [t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Nev. RPC 1.7(a)(2). Notwithstanding the existence of a concurrent conflict of interest a lawyer may represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to both parties and each client gives informed consent, confirmed in writing. Nev. RPC 1.7(b).

Randazza should have disclosed his ongoing work for Bang Bros to Liberty in writing. **Exhibit 304, Kennedy's Report at ¶¶ 37.2-37.4; Tr. at 1035:19-1037:7.** Randazza also needed Liberty to consent in writing to his concurrent work for Bang Bros to the extent that he was advocating having Liberty use Bang Bros to finance the acquisition of Cody Media. *Id.* The same can be said of Randazza simultaneously pursuing claims on behalf of GRHK and Liberty against a common defendant while negotiating the settlement. **Tr. at 1036:16-1037:14.**<sup>34</sup> Accordingly, Randazza's conduct undoubtedly fell below the standard of care and breached the fiduciary duty he owed to the Company.

#### g. Miscellaneous

##### i. *Retention/Destruction of Company Property*

Immediately after ending his employment relationship with Excelsior, Randazza wiped his company issued laptop without notifying Excelsior or seeking their permission. **Tr. 468:8-469:10, 754:15-17.** Randazza also cut-off Excelsior's access to their legal files. Additionally, Randazza refused to return his company issued iPhone until months after this litigation had begun. *Id.* at **470:6-20, 754:12-14.** Nev. RPC 1.16(d) provides:

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, **surrendering papers and property to which the client is entitled** and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

<sup>34</sup> Tellingly, neither of Randazza's experts offered opinions (in their reports or at the hearing) as to Randazza's representation of GRHK.

1 Randazza violated NRPC 1.16 by retaining the iPhone and destroying his client's property  
 2 (the documents located on the company issued laptops) against their will. **Exhibit 304,**  
 3 **Kennedy's Report at ¶¶ 50, 50.10-50.11; Tr. at 1044:25-1046:16, 1094:13-1098:24.** In  
 4 so doing, Randazza fell below the standard of care required of a Nevada attorney.

5 *ii. Representation of Eric Carrender*

6 Randazza also violated the rules applicable to Nevada attorneys by assisting a  
 7 former Excelsior employee in an employment dispute against Excelsior by helping Eric  
 8 Carrender ("Carrender") in his search for an attorney, soliciting others to be a witness in  
 9 support of his Carrender's case, and offering himself to be a witness against the Company  
 10 in the dispute. After Randazza resigned from the Company, he was approached by  
 11 Carrender. **Tr. at 607:23-608:22.** Carrender had filed a charge of discrimination against  
 12 the company with the proper administrative agency. *Id.* Carrender approached Randazza  
 13 about the claims he was making against the Company and Randazza proceeded to have  
 14 his associate, Jay Devoy ("Devoy"), assist Carrender in finding an attorney to represent him  
 15 against Excelsior. **Tr. at 606:11-607:8; Exhibit 379.** At one point Devoy even refers to  
 16 himself as Carrender's attorney when explaining confidentiality to him. *Id.* Randazza  
 17 offered to be a witness against Excelsior, and communicated with another employee of the  
 18 Company, Nick Mosier, to request that he also serve as a witness on Carrender's behalf.  
 19 **Tr. at 607:9-22, 608:23-609:3; Exhibit 379.** When Carrender informed Randazza that he  
 20 was still having difficulty finding an attorney to assist him, Randazza encouraged him to  
 21 keep looking (and in turn continue pursuing his claims against Excelsior). **Exhibit 379.**

22 Nev. RPC 1.9 provides that: "A lawyer who has formerly represented a client in a  
 23 matter shall not thereafter represent another person in the same or a substantially related  
 24 matter in which that person's interests are materially adverse to the interests of the former  
 25 client unless the former client gives informed consent, confirmed in writing." As Kennedy  
 26 explained, neither Randazza nor Devoy should have assisted Carrender, whether by giving  
 27 him advice, agreeing to testify on his behalf, encouraging others to testify on his behalf, or  
 28 helping him to find a lawyer. **Exhibit 304, Kennedy's Report at ¶¶ 50, 50.12-50.15.**



1 Randazza owed a duty of loyalty to Excelsior and cannot, without informed, written  
 2 consent, assist persons such as Carrender whose interests are materially adverse to the  
 3 Company in matters substantially related to the prior representation. *Id.* at ¶¶ 50, 50.12-  
 4 50.15; Tr. at 1046:17-1047:25. By doing so, Randazza undoubtedly violated Nev. RPC  
 5 1.9(a).

6 **iii. Improper Solicitation of Information From Excelsior**

7 By way of reminder, Chip Carter is the former Excelsior Director of Marketing who  
 8 Randazza would communicate with regarding the dispute between Randazza and Excelsior  
 9 during the time period that Carter still worked for the Company.<sup>35</sup> Specifically, Randazza  
 10 requested that Carter send him copies of the bar complaints the company sent to various  
 11 State Bar organizations and also shared his opinions about those complaints. Tr. at  
 12 332:23-335:22, 609:4-609:22. During the time period that Carter and Randazza were in  
 13 contact, Randazza confronted Dunlap at an industry event in Phoenix, Arizona, and during  
 14 their confrontation Randazza cited sales figures that Carter had access to but Randazza  
 15 would not have known about given that he no longer worked for the company. Tr. at  
 16 761:25-763:16, 880:11-884:4

17 Nevada lawyers may not communicate about the subject of the representation with a  
 18 person the lawyer knows to be represented by another lawyer. Nev. RPC 4.2. A lawyer  
 19 also "shall not use means that have no substantial purpose other than to embarrass, delay,  
 20 or burden a third person, or use methods of obtaining evidence that violate the legal rights  
 21 of such a person." Nev. RPC 4.4(a). In light of these expectations, Randazza should not  
 22 have been in contact with Carter regarding the litigation given that he knew the Company  
 23 was represented by counsel. **Exhibit 304, Kennedy's Report at ¶¶ 50, 50.16-50.20.**  
 24 Randazza also should not have requested that Carter disclose confidential information  
 25 related to Excelsior/Liberty. *Id.* His conduct in so doing violated Nev. RPC 4.2 and 4.4(a)  
 26

27 <sup>35</sup> Carter authored and issued press releases for the company, his office was in the executive wing  
 28 of the building, he attended Executive meetings, he also had authority to and at times did bind the  
 company to contracts. Tr. at 887:13-888:8.

1 and evidences a complete disregarding for Excelsior's rights. *Id.*

2 **h. Proper Remedy For Malpractice and Breach of Fiduciary Duty**

3 **i. Actual Damages**

4 As a result of various forms of legal malpractice committed by Randazza during the  
5 course of the Oron litigation, Oron not only appealed Judge Navarro's Order enforcing the  
6 settlement agreement, but on November 16, 2012 they also filed an arbitration demand  
7 against Liberty. **Exhibit 334**. The demand alleged, amongst other things, that Randazza  
8 utilized a hacker to obtain privileged and confidential documents/information for use in the  
9 litigation. **Exhibit 334 (EMC000738); Tr. at 768:18-769:12**. Oron also alleged that in  
10 contravention of the settlement agreement, Liberty did not dissuade others from bringing  
11 suit against Oron and actually assisted another company in filing a "copycat" lawsuit  
12 against them. **Exhibit 334 (EMC000741)**. As discussed above, Randazza was the sole  
13 cause of both of these serious allegations made in the arbitration demand. Because of  
14 these serious allegations, Excelsior's new counsel engaged in settlement discussions with  
15 Oron and eventually Liberty was forced to resettle the Oron case for \$275,000 (which was  
16 half of the previous settlement amount of \$550,000). **Tr. at 765:17-768:5, 768:18-769:12**.  
17 At the time of the resettlement the entire \$550,000 settlement remained in Randazza's trust  
18 account as supposed disputed funds, but Randazza agreed to release \$275,000 to Liberty  
19 so that amount could be paid back to Oron. ***Id.* at 765:17-768:5, 768:18-769:12**.

20 Randazza's malpractice and unethical behavior was the driving force behind the  
21 arbitration demand filed by Oron which forced Liberty to agree to resettle the case for half  
22 of what it had already been awarded. **Tr. at 766:21-767:8, 770:4-770:8**. Accordingly,  
23 Randazza's actions undoubtedly caused Liberty actual damages in the amount of **\$275,000**  
24 **(plus interest from August 2012 to the present)**. The Arbitrator should award that  
25 Randazza pay such damages as a result of his malpractice and breach of fiduciary duties.

26 Additionally, in early August 2012 Gurvits and Randazza were negotiating to settle  
27 with Oron in exchange for Liberty dropping their motion for attorneys' fees. **Tr. at 404:25-**  
28 **405:16**. On two separate occasions, Randazza was presented with a settlement offer and

1 draft agreement which provided for Oron to pay \$600,000 (\$50,000 more than the previous  
 2 settlement amount that had been enforced but had not yet been paid). **Exhibit 405-407;**  
 3 **Tr. at 405:2-408:16, 417:3-418:21.** By way of reminder, the agreements also had a  
 4 \$75,000 payment (or "settlement") to Randazza. *Id.* That subsequent settlement  
 5 agreement was eventually presented to Gibson and Randazza's "bribe" negotiations were  
 6 revealed. **Tr. at 424:7-425:16, 701:15-702:10.** Randazza neglected to tell Gibson that the  
 7 agreement had a specific expiration date, and after the discovery of the "bribe" occurred the  
 8 settlement was not executed. **Tr. at 710:11-711:6, 770:9-16.** Had Randazza not  
 9 committed malpractice by engaging in improper negotiations with Oron, Liberty would have  
 10 accepted the \$600,000 settlement and would have been entitled to an additional \$50,000.  
 11 *Id.* The Arbitrator should award this additional **\$50,000 loss (plus interest from August**  
 12 **2012)** as another form of Excelsior's damages resulting from Randazza's misconduct.

#### 13 *ii. Disgorgement/Fee Forfeiture*

14 In addition to the blatant damages caused by Randazza discussed above, Excelsior  
 15 seeks disgorgement/forfeiture of the salary and bonuses it paid to Randazza during the  
 16 time periods in which he was committing malpractice and breaching the fiduciary duty to  
 17 Liberty. As noted in Dennis Kennedy's expert report, if an attorney violates the duties owed  
 18 to a client while representing that client, he is generally precluded from recovering his fees.  
 19 *See e.g. Pringle*, 87 Cal. Rptr. 2d at 93-94; *Settelmeyer & Sons, Inc. v. Smith & Harmer,*  
 20 *Ltd.*, 124 Nev. 1206, 1217, 197 P.3d 1051, 1059 (Nev. 2008); *see also* Restatement (Third)  
 21 Law Governing Lawyers § 37 (stating that when a lawyer engages in a "clear and serious  
 22 violation of duty to a client," the lawyer "may be required to forfeit some or all of the  
 23 lawyer's compensation for the matter"); Restatement (Third) of Agency § 8.01 cmt. d(2) ("An  
 24 agent's breach of fiduciary duty is a basis on which the agent may be required to forfeit  
 25 commissions and other compensation paid or payable to the agent during the period of the  
 26  
 27  
 28

1 agent's disloyalty").<sup>36</sup>

2 The factors the Arbitrator should consider when assessing forfeiture and/or  
3 disgorgement include: (1) the gravity and timing of the violation; (2) the attorney's  
4 willfulness; (3) the effect of the violation on the value of the attorney's work for the client; (4)  
5 other threatened or actual harm suffered by the client; (5) the adequacy of other available  
6 remedies. See Restatement (Third) Law Governing Lawyers § 37. It is generally a  
7 question of fairness and reasonableness in determining what portion and/or amount of fees  
8 the attorney and/or his firm must disgorge or forfeit. **See discussion in Exhibit 304,**  
9 **Kennedy's Report at ¶ 51.5.**

10 Randazza's expert, Ms. Peck, took issue with Kennedy's opinion that fee forfeiture  
11 and disgorgement are appropriate in this matter. She cited *Pringle v. La Chapelle*, 73 Cal.  
12 App. 4th 1000, 1006, 87 Cal. Rptr. 2d 90 (1999) for the proposition that not every violation  
13 of the rules of professional conduct make fee forfeiture appropriate. Mr. Kennedy, and in  
14 turn Excelsior, do not disagree with Ms. Peck's point. Indeed, as the court in *Pringle*  
15 suggests, under California law there typically "must be a serious violation of the attorney's  
16 responsibilities." *Id.* The evidence entered during the hearing and discussed herein shows  
17 that Randazza committed serious violations of the duties and responsibilities he owed  
18 Excelsior/Liberty which make forfeiture/disgorgement entirely appropriate.

19 Randazza's experts also attempt to limit forfeiture and/or disgorgement in this case  
20 by claiming that Excelsior must demonstrate causation and actual damages in order to for  
21 the Arbitrator to award such a remedy. As discussed above, Randazza did cause actual  
22 damages to Excelsior to the tune of \$325,000. Nonetheless, even if it hadn't suffered  
23 actual damages case law and trusted secondary authority makes clear that a client is not  
24 required to prove actual damages resulting from the fiduciary breach in order to seek  
25 forfeiture and/or disgorgement of fees. See e.g. *Burrow v. Arce*, 997 S.W.2d 229, 237-40  
26

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27 <sup>36</sup> It is well settled that forfeiture and disgorgement is appropriate when attorneys engage in  
28 conflicting representation without obtaining informed consent from all affected clients. See cases  
cited in **Exhibit 304, Kennedy's Report at ¶ 51.2-51.3.**

(Tex. 1999); see also Restatement (Third) of Agency § 8.01 cmt. d(2) ("Forfeiture may be the only available remedy when it is difficult to prove that harm to a principal resulted from the agent's breach or when the agent realizes no profit through the breach"). In *Burrow*, the Supreme Court of Texas thoroughly analyzed the issue and noted:

Pragmatically, the possibility of forfeiture of compensation discourages an agent from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. **The remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that the principal will be unharmed or may have difficulty proving the existence or amount of damages.** In other words, as comment b to section 49 of the proposed *Restatement (Third) of the Law Governing Lawyers* states, '[f]orfeiture is also a deterrent.'

*Id.* at 238 (emphasis added). To limit forfeiture of compensation to instances in which the principal can prove actual harm conflicts with the justifications for the rule. *Id.* The main purpose of forfeiture is not to compensate the injured principal "even though it may have that effect." *Id.* "Rather, the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty." *Id.* In light of this analysis, **the court held that a client need not prove actual damages** in order to obtain forfeiture of an attorney's compensation for the attorney's breach of fiduciary duty to the client. *Id.* at 240(emphasis added); see also Restatement (Third) of Agency § 8.01 cmt. d(2) for discussion of this issue.

Randazza's experts rely on two California cases for their argument that actual damages must be established in order for disgorgement or forfeiture to be awarded. In *Frye v. Tenderloin Housing Clinic, Inc.*, 38 Cal.4th 23 (2006), the court was faced with the decision of whether a nonprofit corporation which performed public interest legal work should be forced to disgorge **statutory** attorneys fees awarded in a lawsuit it filed on behalf of tenants of a residential hotel against their landlord. The nonprofit was sued by one of the tenants after the nonprofit won a favorable judgment (and was awarded fees) on behalf of the tenants in the underlying lawsuit. The only purported ethical violation the nonprofit corporation committed was whether it was lawfully allowed to practice law without



1 registering or complying with California Corporations Code section 13406(b) which provides  
2 the sole authority under which a nonprofit corporation is authorized to practice law. *Id.* The  
3 court noted that the state bar permitted numerous nonprofit corporations to practice law  
4 without registering and that the plaintiff had suffered no injury from the minor violation  
5 (given that the opposing party was the one who paid the fees plaintiff sought disgorged). In  
6 light of those facts, the court held that in this case the "remedy of disgorgement is grossly  
7 disproportionate to the wrongdoings on [the nonprofit's] part and would constitute a totally  
8 unwarranted windfall to [the plaintiff]." *Id.* at 50.

9 Similarly, in *Slovensky v. Friedman*, 142 Cal.App.4th 1518 (2006), a client sued his  
10 former attorneys for legal malpractice and breach of fiduciary duty arising from their  
11 settlement of a personal injury claim on the client's behalf. In this case, the firm committed  
12 several violations of ethical duties against the client but was still able secure a settlement  
13 for the plaintiff of \$340,000. Plaintiff argued that she suffered damages because had the  
14 firm not engaged in the misconduct it was accused of she would have received a higher  
15 settlement amount. On summary judgment, the firm was able to present undisputed  
16 evidence that they were able to secure the \$340,000 settlement for plaintiff even though the  
17 statute of limitations had run on her claims before she ever consulted with the firm. *Id.* at  
18 1525-1533. In light of these facts, plaintiff could not prove that she suffered actual  
19 damages as a result of the claims she made against her former attorneys. *Id.* at 1533-  
20 1534. Based almost entirely upon the reasoning articulated in *Frye* (although *dicta* in the  
21 *Slovensky* overstates the actual holding in *Frye*), the court upheld summary judgment as to  
22 plaintiffs breach of fiduciary duty claim because Plaintiff clearly suffered no damages. The  
23 court's decision was firmly rooted on the fact that "the only apparent consequence of  
24 defendants' fiduciary breach was a substantial settlement plaintiff could not otherwise have  
25 obtained." *Id.*

26 Unlike *Frye* and *Slovensky*, here, the equitable remedy of forfeiture/disgorgement of  
27 Randazza's salary and bonuses for periods in which he was unethically behaving would not  
28 be "grossly disproportionate to the wrongdoings" Randazza engaged in. This is also not a

1 situation like *Slovensky* where the plaintiff actually received something extremely valuable  
 2 from the representation that it would not and arguably should not have otherwise received.  
 3 All these two cases show is that the Arbitrator has the authority to weigh the evidence in its  
 4 entirety and make his determination in accordance with the factors articulated in the  
 5 Restatement (Third) Law Governing Lawyers § 37. See *Rodriguez v. Disner*, 688 F.3d  
 6 645, 653 (9th Cir. 2012) ("A court has broad equitable power to deny attorneys' fees (or to  
 7 require an attorney to disgorge fees already received"). Indeed, since *Frye* and *Slovensky*  
 8 were decided, a California court has cited to Section 37 of the Restatement when analyzing  
 9 whether damages are required in order to grant forfeiture or disgorgement of fees. See  
 10 *Fair v. Bakhtiari*, 195 Cal.App.4th 1135 (2011) ("it makes sense to require proof of damages  
 11 where the client seeks compensatory damages as a tort remedy for breach of fiduciary  
 12 duty, but not if the client seeks only forfeiture of fees").

13 Randazza and his experts also attempted to argue that the Arbitrator cannot order  
 14 forfeiture/d disgorgement from Randazza because he worked in-house and received a salary  
 15 instead of fees from clients. This argument is illogical. Disgorgement is available if "a  
 16 lawyer is paid by a client to render legal services." See Tr. at 1049:18-1050:9. Whether  
 17 that compensation is in the form of fees or salary, the principal remains the same. *Id.*

18 Additionally, forfeiture is commonly applied in the context of fiduciary relationships  
 19 outside the attorney-client relationship. In such situations, courts have not hesitated to  
 20 require employees/agents to forfeit/d disgorge, salary, commissions, and bonuses. See  
 21 *Mabry v. Tom Stanger & Co.*, 33 P.3d 1206, 1209 (Colo. App. 2001) (real-estate broker's  
 22 breach of fiduciary duty results in a forfeiture of a broker's entitlement to a commission);  
 23 *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 385-386 (Mo. Ct. App. 2000) (plaintiff's  
 24 breach forfeited his right to "all compensation, including bonuses and severance pay, to  
 25 which he may have been entitled"); *Riggs Inv. Mgmt. Corp. v. Columbia Partners, L.L.C.*,  
 26 966 F. Supp. 1250, 1266-67 (D.D.C. 1997) (agent forfeits all compensation from time of  
 27 disloyal action to agent's termination six months later). There is simply no reason that  
 28 Randazza should be treated more favorably because he was an in-house counsel.

Moreover, Randazza was not strictly an in-house counsel. Instead, Randazza had a robust outside practice the he grew during the course of his employment with Excelsior. Indeed, interrogatory responses in this case indicate that Randazza regularly billed large sums of hours to his outside clients (11/09 75.35 hours; 12/09 55.9 hours; 07/10 73.6 hours; 08/10 41.37 hours; 10/10 43.2 hours; 03/11 43.95 hours; 07/11 52.5 hours; 09/11 68.8 hours; 10/11 70.4 hours; 11/11 92.3 hours; 12/11 83.45 hours; 01/12 75.7 hours; 03/12 52.9 hours; 05/12 91.75 hours; 06/12 73.8 hours; 07/12 60.15 hours; 08/12 63.9 hours). **Exhibit 313.** Also, it must not be forgotten that these numbers only reflect hours Randazza personally billed and do not reflect the hours billed by the attorneys working at his firm through which he was also profiting during this time period.

Consistent with Dennis Kennedy's Expert Opinion, Randazza should be compelled to forfeit and/or disgorge various fees, bonuses and salary paid to him during the time period he was committing malpractice and breaching the fiduciary duty he owed to Excelsior/Liberty. **Exhibit 304, Kennedy's Report at ¶¶ 51 - 52.5.** Specifically, Excelsior seeks forfeiture/d disgorgement of Randazza's salary from September 2010 to February 2011 while working on the TNAFlix case (**\$125,580**);<sup>37</sup> the bonus Randazza received on the TNAFlix case (**\$12,500**); Randazza's salary from April 2011 to September 2011 while working on the MegaUpload case (**\$128,719.50**); the bonus Randazza received on the MegaUpload case (**\$150,000**); Randazza's salary from June 2012 to August 2012 during the pendency of the Oron case (**\$65,929.50**); the remaining portion of the Oron settlement funds currently in his trust account because his breaches during the Oron case do not entitle him to any bonus (**believed to be \$275,000**); and Randazza's salary from June 2010 to August 2012 during the time period he represented XVideos and XNXX while employed by and representing Excelsior/Liberty (**\$586,626.61 in total but only \$266,397.61 in addition to the salary listed above so as to avoid double recovery**). Tr.

<sup>37</sup> The salary reflected in this paragraph that was paid to Randazza during the periods stated herein was calculated from Randazza's actual pay records which were entered into evidence as **Exhibit 374**.

1 at 770:17-772:8.

2 2. Conversion

3 Upon his resignation, Randazza converted Excelsior's property by failing to return  
4 his laptops and iPhone and deleted and/or destroyed all documents and files saved on his  
5 laptop without the Company's permission. Randazza also kept a company whiteboard  
6 forcing Excelsior to expend legal fees to get it back. Randazza's actions caused direct  
7 damage to Excelsior in the form of the costs it incurred to undergo a forensic examination  
8 of the laptop and attempt to recover any files Randazza deleted. Excelsior seeks a  
9 recovery of these damages caused by virtue of Randazza's actions. Conversion is "a  
10 distinct act of dominion wrongfully exerted over another's personal property in denial of, or  
11 inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such  
12 title or rights." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048  
13 (2000)(internal citations omitted). Further, conversion is an act of general intent, which  
14 does not require wrongful intent and is not excused by care, good faith, or lack of  
15 knowledge. *Id.*

16 It is undisputed that at the time of Randazza's resignation he failed to return  
17 Company property, including the Company issued laptop and iPhone that had been issued  
18 to him. Randazza eventually did return one of the laptops and the phone but prior to  
19 returning the laptop he deleted and/or destroyed all documents and files saved on it without  
20 the Company's permission. **See Exhibit 305, Expert Report of Michael Holpuch at p. 3**  
21 **of 41; Tr. at 200:7-201:10, 470:6-20, 465:10-467:24, 468:8-469:10, 754:12-14, 754:15-17,**  
22 **975:20-978:2, 982:12-16, 982:22-984:22.** Randazza never returned the second laptop he  
23 testified was in his possession. **Tr. at 197:15-19; 772:16-19.** By deleting, destroying, or  
24 saving the company's legal files in a location they had no access to, and by not returning  
25 the second laptop, Randazza committed a distinct act of dominion wrongfully exerted over  
26 Excelsior's property. This conversion of Excelsior's property was in denial of, or  
27 inconsistent with Excelsior's title or rights or in derogation, exclusion, or defiance of such  
28 rights. Excelsior has suffered actual damages as a result of Randazza's deletion,

1 destruction, or exertion of Excelsior's legal files that were in his possession and requests  
 2 an appropriate award to compensate for said damages. It also seeks return of the second  
 3 laptop. Additionally, Excelsior requests that it be compensated for the costs of the forensic  
 4 examination conducted on Randazza's laptop and iPhone by QUIVX in an attempt to  
 5 restore data that was contained on those devices. The cost of such examination and  
 6 attempted-restoration was \$3,215.98. **See QUIVX Invoice attached hereto as Exhibit B.**

### 7 3. Intentional Interference with Contractual Relations

8 Upon a thorough review of the evidence presented at the hearing with respect to this  
 9 cause of action, Excelsior agrees to dismiss its intentional interference with contractual  
 10 relations claim against Randazza.

### 11 4. Unjust Enrichment

12 The evidence at the arbitration showed that Randazza conducted pro-bono litigation  
 13 while accepting salary from the Company during that time period, yet he failed to disclose  
 14 or turn over an award of \$55,000 in attorney's fees he recovered in the pro-bono case.  
 15 Excelsior is entitled to recover the \$55,000 fee award kept by Randazza pursuant to its  
 16 claim for unjust enrichment.

17 Unjust enrichment is "the unjust retention ... of money or property of another against  
 18 the fundamental principles of justice or equity and good conscience." *Asphalt Products*  
 19 *Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799, 802, 898 P.2d 699, 701 (1995). The  
 20 evidence showed that in early 2011, Randazza proposed a pro-bono project to Excelsior,  
 21 which Excelsior accepted under the condition that Randazza comply with his Employment  
 22 Agreement and represent the client as General Counsel of Excelsior. **Tr. at 603:9-19,**  
 23 **719:6-20, 803:13-21.** Randazza's Employment Agreement specifically contemplates that  
 24 when Randazza conducts pro-bono cases under the auspices of Excelsior's legal  
 25 department, the approved projects are to be part of his work for the Company and were  
 26 supposed to be done in a manner that would allow any benefits from the representation to  
 27 flow to the company. **See Exhibit 332 at EMC000499.**

28 Randazza handled the matter through his personal law firm while still using company



1 time and resources to work on the matter. *Id.* at 719:21-720:18, 804:10-805:13, 839:8-  
 2 839:15. Excelsior later discovered that Randazza actually charged the pro-bono client for  
 3 some of his time despite the fact that Excelsior fronted fees and costs associated with the  
 4 matter, including Randazza's compensation. *Id.* at 603:20-604:23, 719:21-720:18.  
 5 Randazza also kept a \$55,000 fee award from the court rather than reimbursing Excelsior  
 6 for the fees and costs it expended on the project. *Id.* Additionally, Randazza was unjustly  
 7 enriched by the \$5,000 contribution made by James Grady which was never paid or  
 8 contributed to the company. *Tr.* at 602:16-20. Indeed, Randazza could not testify as to  
 9 what those funds were used for. In light of these facts, the Arbitrator should order that  
 10 Randazza reimburse Excelsior for the unjust enrichment he benefitted from.

#### 11 5. Breach of Contract

12 Excelsior established by a preponderance of the evidence that Randazza breached  
 13 his Employment Agreement by failing to comply with his ethical obligations as required, by  
 14 spending excessive time on non-Excelsior matters and by failing to wind down his outside  
 15 law practice as envisioned by the agreement. Randazza's breach of these provisions of  
 16 the Employment Agreement excused Excelsior's performance under the agreement but  
 17 caused Excelsior damages in the form of the excessive salary and bonuses it compensated  
 18 Randazza with throughout the course of his employment while he was in violation of the  
 19 agreement.

20 The elements of a cause of action for breach of contract under California law are: (1)  
 21 the existence of a contract; (2) Plaintiff's performance or excuse for nonperformance; (3)  
 22 Defendant's breach; and (4) the resulting damages to Plaintiff. *Brown v. Grimes*, 192 Cal.  
 23 App. 4th 265, 277, 120 Cal. Rptr. 3d 893, 902 (2011). It is undisputed that Randazza's  
 24 Employment Agreement was a valid contract between the parties. The evidence  
 25 established that Excelsior performed its obligations under the Employment Agreement or  
 26 was excused from performance of certain aspects of the agreement as a result of  
 27 Randazza's material breach. The evidence at the hearing also established that Randazza  
 28 breached the Employment Agreement by failing to comply with many ethical obligations as

1 detailed *supra* and in Dennis Kennedy's Expert Report (Exhibit 304). See Exhibit 332  
 2 (EMC000498-499)(noting Randazza is "bound to adhere to the professional ethical  
 3 standards imposed upon attorneys by state bar associations and under the common  
 4 law" and that his representation of other clients must be rendered without legal or  
 5 professional conflict with Excelsior). Randazza also breached the Employment  
 6 Agreement by spending excessive time on non-Excelsior matters, which conflicted with his  
 7 ability to perform his duties as the General Counsel for Excelsior and maintaining a private  
 8 law practice in excess of that permitted by the agreement. See Exhibit 332 (EMC 000494,  
 9 EMC 000499)(noting that his outside practice should taper down as quickly and  
 10 ethically as possible and that outside projects should be rendered during non-  
 11 working hours); Exhibit 313 (showing excessive hours billed by Randazza to outside  
 12 clients during his full-time employment with Excelsior). As a result of Randazza's  
 13 breach, Excelsior suffered damages, which included but were not limited to the generous  
 14 salary and many bonuses Randazza received throughout his employment with the  
 15 company which it seeks disgorgement of as discussed above.

## 16 II. CONCLUSION

17 For the foregoing reasons, an arbitration award should be returned in favor of  
 18 Excelsior on all counts discussed herein.

19 Judgment should be rendered in favor of Excelsior on each of the claims Randazza  
 20 brought against it in light of the following:

- 21 1. Randazza's First and Second causes of action are for violations of the  
 22 California Labor Code even though the alleged conduct occurred while  
 23 Randazza lived and worked in Nevada and because Excelsior properly  
 24 compensated Mr. Randazza for the items he claims he is owed;
- 25 2. Randazza's Third claim for unpaid wages and penalties under NRS § 608.050  
 26 fails because the statute is inapplicable to the damages Randazza seeks and  
 27 because no private right of action exists to enforce it;
- 28 3. Randazza's Fourth claim for breach of contract fails because he resigned his

1 employment making his claim for a severance moot and because he  
 2 committed various breaches of the agreement which excused Excelsior's  
 3 performance;

4 4. Randazza's Fifth claim for wrongful termination failed because the evidence  
 5 establishes that Randazza was not terminated or constructively discharged;

6 5. Randazza's Sixth claim for hostile work environment fails because there is no  
 7 evidence Randazza was harassed because he was a heterosexual male; and

8 6. Randazza's Seventh claim for retaliation fails because there is no evidence  
 9 that he engaged in protected activity or that he suffered an adverse  
 10 employment action in light of such activity.

11 With respect to its Counterclaims, Excelsior specifically seeks an award of:

12 1. \$275,000 plus interest that Excelsior was forced to pay Oron as part of the  
 13 resettlement of the Oron litigation;

14 2. \$50,000 plus interest in additional funds that Oron offered Excelsior in August  
 15 2012 in exchange to drop their attorneys fee award but was not received as a  
 16 result of Randazza's actions;

17 3. Disgorgement of \$125,580 salary paid to Randazza during the pendency of  
 18 the TNAFlix litigation;

19 4. Disgorgement of \$12,500 bonus paid to Randazza for his work in the TNAFlix  
 20 case;

21 5. Disgorgement of \$128,719.50 salary paid to Randazza during the pendency  
 22 of the MegaUpload case;

23 6. Disgorgement of \$150,000 bonus paid to Randazza for his work in the  
 24 MegaUpload case;

25 7. Disgorgement of \$65,929.50 salary paid to Randazza during the pendency of  
 26 the Oron case;

27 8. Disgorgement of \$586,626.61 in total salary but only \$266,397.61 in addition  
 28 to the salary already listed herein (so as to avoid double recovery) paid to

Randazza during the period in which he was concurrently representing  
XVideos/XNXX and Excelsior;

9. The remaining portion of the Oron settlement funds currently in Randazza's  
trust account as disputed funds because his breaches during the Oron case  
do not entitle him to any bonus (believed to be \$275,000 plus interest);

10. The additional non-Oron related funds currently in Randazza's trust account  
totaling at least \$30,000 plus interest to which Liberty is entitled;

11. An award deemed appropriate by the Arbitrator for the destruction and/or  
conversion of Excelsior's files contained on Randazza and Erika Dillon's  
computers prior to them being wiped;

12. \$3,215.98 cost of the forensic examination and attempted restoration of  
Randazza and Erika Dillon's laptops and Randazza's iPhone;

13. A company laptop (and any other company property) that Randazza indicated  
remain in his possession;

14. \$55,000 fee award that unjustly enriched Randazza for his work in the  
Righthaven pro-bono matter;

15. \$5,000 contribution to the Oron legal fees made by James Grady which was  
never paid to Excelsior and unjustly enriched Randazza;

16. A third-party accounting of Randazza's trust fund(s) to ensure all settlement  
funds (including various pay-over-time settlements) Excelsior/Liberty is  
entitled to have been paid to the Company. Such accounting should be done  
by an accounting firm of Excelsior's choice but paid for by Randazza;

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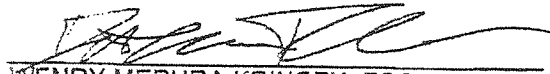
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1 17. An award of fees and costs in this case in light of the frivolous nature of  
2 Randazza's claims against Excelsior.

3  
4 Dated: April 3, 2015

5 Respectfully submitted,

6  
7 

8 WENDY MEDURA KRINCEK, ESQ.  
9 ETHAN D. THOMAS, ESQ.  
10 LITTLER MENDELSON, P.C.

11 Attorneys for Defendant  
12 EXCELSIOR MEDIA CORPORATION  
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**PROOF OF SERVICE**

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On April 3, 2015, I served the within document(s):

**EXCELSIOR MEDIA CORPORATION'S POST-ARBITRATION BRIEF**

- ☒ By **E-Mail** – a true copy of the document(s) listed above e-mailed to the parties as set forth below.

Kenneth P. White, Esq.  
Brown White & Newhouse, LLP  
333 South Hope Street, 40<sup>th</sup> Floor  
Los Angeles, CA 90071

([kwhite@brownwhitelaw.com](mailto:kwhite@brownwhitelaw.com))

Hon. Stephen E. Haberfeld (Ret.)  
Reggie Joseph  
707 Wilshire Blvd., 46<sup>th</sup> Floor  
Los Angeles, CA 90017

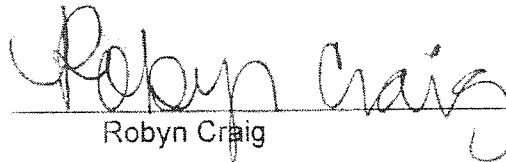
([rjoseph@jamsadr.com](mailto:rjoseph@jamsadr.com))

([shaberfeld@jamsadr.com](mailto:shaberfeld@jamsadr.com))

- ☒ By **Federal Express** - a true copy of the document(s) listed above sent via Federal Express to the person(s) at the address(es) set forth below.

Hon. Stephen E. Haberfeld (Ret.)  
8224 Blackburn Ave., Suite 100  
Los Angeles, CA 90048

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 3, 2015, at Las Vegas, Nevada.

  
Robyn Craig

Firmwide: 131782927.1 073131.1001

# EXHIBIT A

# EXHIBIT A

JAMS ARBITRATION No. 1260002283

MARK J. RANDAZZA,

Claimant,

vs.

EXCELSIOR MEDIA CORP., a Nevada Corporation;  
LIBERTY MEDIA HOLDINGS, LLC, a California limited  
-liability company and JASON GIBSON, individually,

Respondents.

---

ORDER OF JULY 3, 2013

The Arbitrator denies Claimant's application for JAMS Employment Arbitration Rule 24(e) preliminary relief, without prejudice. That is principally because Claimant's application is based on the following assertion:

"Mr. Randazza is entitled to a [JAMS Arbitration Rule 24(e)] Preliminary Order because Excelsior, standing alone, does not have sufficient assets to compensate Mr. Randazza [if or] when he recovers at Arbitration." [March 29, 2013 letter application, at p. 2.]

Claimant's March 29, 2013 application, among other things, requested "an Order compelling Excelsior's sister entities, Liberty Media Holdings ('Liberty') and Becar Management, LLC ('Becar') and the companies' principal, Jason Gibson ('Gibson') (collectively the 'Affiliated Parties') to join this arbitration." [*Id.*, at p. 1] Claimant asserted that an order "to secure his likely recovery is warranted" because, importantly, "Jason Gibson (...) (2) kept the intellectual property of the enterprise --- the valuable property --- in the separate entity Liberty to insulate it from any judgment against Excelsior." [*Id.* at p. 2, see also *id.* at pp. 4, 7]

On June 27, 2013, Liberty Media Holdings, LLC made an unconditional general appearance in this arbitration.

By so appearing, the Arbitrator has personal jurisdiction over Liberty and, for the reasons set forth below, Claimant shall be afforded the opportunity to amend his pleadings.

There has not been a showing that Liberty no longer has the valuable intellectual property alleged\* or that either Excelsior or Liberty --- separately or together --- does/do not have sufficient assets to satisfy Claimant's financial claims --- assuming arguendo that he would prevail the maximum value of his maximum claims and seek enforcement of a monetary arbitration award in his favor.

[\*According to Claimant, the intellectual property consists of copyrights and trademarks, which Excelsior produced, sold and licensed are the only assets of value --- other than, to a lesser extent, expensive cars used by Excelsior's employees (which are owned by Becar Management, LLC). Randazza Decl., Pars. 11(a), 12, 23.]

In light of the foregoing and based on the scant current record before the Arbitrator, it does not appear necessary to decide whether it is required, appropriate or permissible --- before a full evidentiary hearing --- to decide whether any person or entity is an "alter ego" of Excelsior or, now, of Liberty or that not determining "an alter ego relationship would be tantamount to limiting Mr. Randazza's potential recovery to near zero, even before this arbitration began." [Id. at p.7] If circumstances change, Claimant may re-seek preliminary relief, without prejudice to the denial of initially requested preliminary relief. If that occasion arises, the Arbitrator might revisit the preliminary determination set forth in the first sentence of this paragraph.

The Arbitrator is also not inclined to grant requested early preliminary relief, because a key element in the decisional process is whether or not Claimant has shown the probable validity of his breach-of-contract claim and/or is likely to prevail on at least one of his other claims to warrant freezing or tying up or even liening the asset of a party. The very undeveloped state of the record at this very early stage of the arbitral process militates against making important merits-related determinations at this time. The Arbitrator is also not inclined at this very early stage of the arbitration to dismiss Claimant's Claims One or Two\*\* or to foreclose Claimant from attempting to show that Nevada and/or California law provide legal predicates for the claims which are the subject of the motion to dismiss.

[\*\*The two claims are claims for reimbursement of expenses under California Labor Code sec. 2802 and for unpaid wages and vacation time under California Labor Code secs. 201-203.]

Subject to revisitation and/or reconsideration --- unless and until shown and persuaded otherwise --- the Arbitrator preliminarily believes that:

A) The applicability of California or Nevada wage-and-hour law is not extraterritorial generally --- including not generally following assumed former California employees forever and for all purposes --- but only in certain circumstances, if at all.

B) Whether those circumstances can be alleged and proven to have occurred here is not clear.

C) The "governing law" provision of the parties' employment contract for Claimant's services --- generally providing for the application of California substantive law --- does not govern which law applies to statutory wage-and-hour and other non-contractually-based claims in arbitration. See Narayan v. EGL, Inc., 616 F.3d 895, 899 (9th Cir. 2010) (benefit claims brought under the California Labor Code "do not arise out of the contract, involve the interpretation of any contract terms, or otherwise require there to be a contract.")

The case law also appears to be that --- even assuming a wholesale incorporation of a particular state's substantive law via a contractual general "governing law" provision, absent a contractual showing of specific intent to the contrary, among other things, such an incorporation must also incorporate the State's presumption against extraterritoriality, if that is the presumption, and so it appears to be under California law.

D) Without resolving the issue at this early juncture, it appears that the strongest authority relied upon by Claimant -- Oracle\*\*\* --- only extends the benefits and protections of California wage-and-hour law to "California resident employees of California employers who leave the state temporarily" and that "California law might not apply to nonresident employees of out-of-state businesses who enter California temporarily..." Whether or to what extent the wage-and-hour laws of California, and possibly Nevada (which are not discussed in extenso in either side's papers) appears to be highly fact and circumstances specific and, additionally, involve considerations of the principles of interstate comity.

[\*\*\*Sullivan v. Oracle Corp., 51 Cal.4th 1191 (2011)]

E) The Arbitrator has a few questions, which the parties might consider for future purposes --- assuming, arguendo, that only California and/or Nevada wage-and-hour law arguably applies to what Claimant will contend in a later, particularized writing trigger(s) the benefits and protections of particular statutory wage-and-hour provisions:

1) At what point --- in the facts and circumstances to be adduced at evidentiary hearing --- did California Labor Code cease to apply and, if different, at what point --- given the same facts and circumstances --- did Nevada wage-and-hour law begin to apply, and what is that law? Is there a material difference between CA and NV law applicable to Claims One & Two?

2) What is the statutory and/or judicial "trigger" for the applicability of one state's wage-and-hour laws to Claimant's activities claimed to be protected under that state's wage-and-hour laws?

3) What is the "nexus" between Claimant's actions in and outside of California and his employment by Excelsior --- which Claimant contends makes California and/or Nevada wage-and-hour law applicable to those actions?


F) What is clear at this very early stage is that now is not the time to deprive or deny Claimant the opportunity to amend or to otherwise provide Respondent with written particulars as to applicable law and facts which make that law applicable. In arbitration, motions to dismiss --- while not prohibited --- are not specifically provided for, either. Generally, deciding on a motion to dismiss "on the pleadings" in an arbitration is not usual or appropriate, because pleadings do not have the same importance as in certain jurisdictions or courts. The JAMS Employment Rules, however, do have Rule 18, to which the parties are respectfully referred.

While Respondent has asserted that "Nevada law does not have analogous wage and hour [or other] laws under which [Claimant] could bring his claims," and has given some NRS sec. 608 examples [Reply, at p.10], Claimant will not be foreclosed at this point from showing otherwise.\*\*\*\*

[\*\*\*\*Claimant has asked for the opportunity "to cure any perceived deficiencies... [including] pleading additional facts regarding Mr. Randazza's work in California and for Liberty, or bringing [the same] or similar causes of action under Nevada law." Randazza Opp., at pp. 2, 7]

In light of the foregoing and the unconditional general appearance of Liberty Media Holdings, LLC in this arbitration, the Arbitrator hereby grants leave to Claimant to replead --- if he wishes --- and leaves it to another occasion (Rule 18) for both sides, among other things, to submit applicable statutory and case law to show which statutory wage-and-hour/labor provisions --- if any --- are applicable to what conduct on which date(s).

Dated: July 3, 2013

  
\_\_\_\_\_  
STEPHEN E. HABERFELD  
Arbitrator



PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: Randazza, Marc J. vs. Excelsior Media Corp., Liberty Media Holdings LLC, Jason Gibson  
Reference No. 1260002283

I, Lulu Santos, not a party to the within action, hereby declare that on July 03, 2013 I served the attached ORDER OF JULY 3, 2013 on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Los Angeles, CALIFORNIA, addressed as follows:

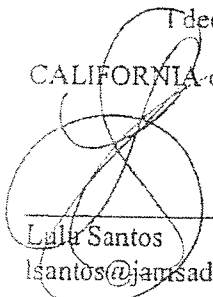
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Kristina E. Gilmore Esq.  
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Parties Represented:  
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Liberty Media Holdings

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Phone: 619-232-0441  
mtaylor@littler.com  
Parties Represented:  
Excelsior Media Corp.

I declare under penalty of perjury the foregoing to be true and correct. Executed at Los Angeles,  
CALIFORNIA on July 03, 2013.

  
\_\_\_\_\_  
Lulu Santos  
lsantos@jamsadr.com

# EXHIBIT B

# EXHIBIT B



*Excelsior Media v. Marc Randazza E-Discovery Costs*

Service	Invoice Number	Date	Total
<b>Forensic Acquisition of Laptop</b> -2 Laptops	83765	5/31/2013	<b>\$1000</b>
<b>Hard Drive</b> -Active and recovered Files delivered on hard drive	83765	5/31/2013	<b>\$150</b>
<b>Jungle Disk Export</b> -Export of Jungle Disk Cache Files	84342	7/31/2013	<b>\$875</b>
<b>Hard Drive</b> -3 hard drives of exported Jungle Disk files	84342	7/31/2013	<b>\$450</b>
<b>Forensic Acquisition of Desktop</b> -1 Desktop	82450	9/30/2013	<b>\$500</b>

Subtotal: \$2,975

Tax: 240.98

Total: \$3,215.98